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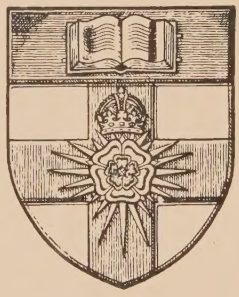

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THE

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OF THE INCORPORATED COUNCIL OF LAW REPORTING.

QUEEN'S BENCH DIVISION

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL,

DECISIONS ON

CROWN CASES RESERVED

AND DECISIONS OF THE

RAILWAY AND CANAL COMMISSION.

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1892

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CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

AND BY THE

RAILWAY AND CANAL COMMISSION.

1892.

THE ENGLISH AND SCOTTISH MERCANTILE INVESTMENT TRUST LIMITED *v.* BRUNTON.

1892
Feb. 24, 27; *March* 5; *April* 26.

Assignment of Debt—Equitable Assignment—Notice—Priority—Company—Debentures—Solicitor—Culpable Negligence—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6.

A company issued debentures purporting to charge "its undertaking and all its property, both present and future," and containing a condition that the charge thereby created was "to be a floating security, but so that the company" should "not to be at liberty to create any mortgage or charge in priority to the said debentures." The company subsequently obtained a loan on the security of a mortgage of its interest in a fund due to it from an insurance company. At the time of the negotiation for the loan the solicitor to the mortgagees was aware that debentures had been issued; but, having been led to believe by the managing director of the company that no incumbrance existed which would have priority to the mortgage, he did not ascertain the terms of such debentures. He knew that they were probably at least in the form of "a floating security on the property present or future of the undertaking." This form was usual at the time. Debentures containing words restraining companies from "creating any mortgage or charge in priority" were also in use at the

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time, but the solicitor to the mortgagees had never seen this form. Notice of the mortgage was given to the insurance company on February 27, 1891. The company afterwards went into liquidation, and the liquidator gave the insurance company notice that the debenture-holders claimed the fund in priority to the mortgagees. An interpleader issue having been directed to determine the question of priority:—

Held, by Charles, J., that the debentures belonged to the class of documents which may or may not, as opposed to that which necessarily must, affect title; that, therefore, the omission of the solicitor to the mortgagees to inquire as to the terms of the debentures did not, in the circumstances, amount to such gross negligence as to affect the mortgagees with constructive notice of the restrictive clause; and that consequently the mortgagees, having given notice of the mortgage to the insurance company before it received notice of the claim of the debenture-holders, had a prior charge upon the fund.

INTERPLEADER issue tried before Charles, J.

The facts and arguments are sufficiently stated in the judgment.

R. T. Reid, Q.C., *Tyrrell Paine*, and *Sargant*, for the plaintiffs.

Cohen, Q.C., *Bremner*, and *Le Fanu*, for the defendant.

Cur. adv. vult.

April 26. CHARLES, J. This was an interpleader issue directed to try the right of the plaintiffs and defendant respectively to the sum of 1834*l.* 15*s.* 4*d.*, or some part thereof, which had been paid into Court by the Sun Fire Office to abide the event. The plaintiffs claimed so much of this amount as would be sufficient to satisfy their claim to a sum of 1400*l.*, with interest thereon, lent by them on February 26, 1891, to the Electrical Engineering Corporation, Limited. The defendant, who represented the debenture-holders of the Corporation, claimed the fund in Court for them.

The Electrical Engineering Corporation was registered in January, 1890, with a capital of 150,000*l.*, in 5*l.* shares. Power was given to the Corporation "to borrow on any terms and conditions any sum or sums of money, and to mortgage and charge the undertaking and all or any part of the real and personal property, present or future, and all or any of the uncalled capital for the time being of the Company, and to issue debentures, debenture stock, and mortgage debentures payable to bearer or otherwise"; and in the Articles of Association it was provided

that the directors might, "for the purpose of securing borrowed money and interest, create and issue respectively mortgage or other debentures, whether payable to bearer or otherwise . . . and generally may charge or mortgage in any form the whole or any part of any property, funds, assets, or effects of the Company, including after-acquired property and uncalled capital as a specific charge or floating security."

In pursuance of these powers there were issued prior to February 26, 1891, 200 "First Mortgage Debentures" of 100*l.* each, and on that day the moneys secured by these debentures were and they still are due to the debenture-holders represented by the defendant.

The form of debenture, so far as is material, is as follows:—

"No. 100*l.* The Electrical Engineering Corporation, Limited, will on October 15, 1900, or on such earlier day as the principal moneys hereby secured become payable, according to the conditions hereof, pay to or other the registered holder for the time being, on presentation and delivery of this Debenture, the sum of 100*l.*, ... and will in the meantime pay interest on the said sum of 100*l.* . . . . . at the rate of 6 per cent. per annum by equal half-yearly payments on the 1st of January and the 1st of July in each year, or on such other day as the principal monies hereby secured become payable according to the conditions hereof. The Corporation hereby charges with such payments its undertaking and all its property whatsoever and wheresoever, both present and future. This Debenture is issued subject to the conditions indorsed hereon. Given under the common seal of the Corporation this day of 189 ." Condition (1) is as follows: "This Debenture is one of a series of 200 Debentures issued or about to be issued by the Corporation. The Debentures of the said series are all to rank pari passu as a first charge on the property hereby charged without any preference or priority one over another, and the charge hereby created is to be a floating security, *but so that the Corporation is not to be at liberty to create any mortgage or charge in priority to the said Debentures.*"

Early in the year 1891, further money being required for the purposes of the undertaking, Mr. Statter, the managing

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director, placed the matter in the hands of Messrs. Close & Co., solicitors, with the view of their finding a lender. They communicated on February 19 with Mr. Van Laun, the manager of the plaintiffs. At this time there was coming due to the Corporation from the Sun Fire Office a large sum upon a policy of insurance on the premises of the Corporation at West Drayton, where a fire had recently taken place, and Mr. Jones, a partner in the firm of Messrs. Close & Co., stated to Mr. Van Laun that the Corporation proposed to borrow on the security of the insurance monies. Mr. Van Laun said that he must be satisfied that his company would be absolutely secured; and thereupon Mr. Jones obtained from the secretary of the Sun Fire Office and handed to Mr. Van Laun a letter in these terms:—

"Dear Sir,

"Electrical Engineering Corporation, Limited.

"Referring to your call here to-day, I have to inform you that, although our examination of the estimate of loss is not complete, I am able to state that we have no doubt whatever that the sum which we shall finally have to pay to the claimants will very far exceed the sum of 2000*l.* which they are desirous of obtaining as an advance from your clients. We have not received notice of any charge upon the loss money, nor do we know of any circumstances which will prevent an assignment of the amount due, or of any part thereof, being made."

This letter was forwarded to Mr. W. Paine, a member of the firm of Paine Son & Pollock, solicitors to the plaintiffs, with instructions to carry out the loan, which was to be of 1900*l.* (afterwards reduced to 1400*l.*) for three months, with interest at the rate of 20 per cent., with a rebate if the advance was paid off earlier, and was to be secured by a charge on the claim against the Sun Fire Office.

On February 24, Mr. Paine saw Mr. Jones and discussed the subject. Mr. Paine, referring to the last sentence of the letter above referred to, said to Mr. Jones, "I may take it from you that you are not aware of any dealings with this insurance." Mr. Jones said that he was not. He was aware, I may here state, of an unsuccessful attempt, which had been made in the previous

month through another solicitor, to borrow money from another person; but he did not know that during the progress of the negotiations Mr. Statter had become fully alive to the difficulty of creating any charge on any part of the assets of the undertaking which should have priority over the debenture-holders. He did not indeed know of the existence of debentures at all until he received Mr. Statter's letter of February 24, to which reference is made below. Mr. Paine also made inquiry as to the borrowing powers of the company, and said he should wish to see the memorandum and articles of association. Mr. Jones went and fetched them, and later on the same afternoon brought also the covering note of the Sun Fire Office. Mr. Paine then engrossed the draft and sent it to Mr. Jones. On February 25th, Messrs. Paine Son & Pollock addressed an inquiry direct to the Sun Fire Office, and received a reply that no notice had been received of any charges upon the monies ultimately payable by the Sun Fire Office to the Corporation.

In the afternoon of February 25th the parties met to complete. There were present Mr. Jones, Mr. Statter, Mr. Scrutton, secretary of the Corporation, and Mr. Paine. There was a direct conflict of evidence as to what then took place; but I do not feel any doubt that I ought to accept Mr. Paine's account as substantially accurate. The letters from the secretary of the Sun Fire Office were read, and the letter from Mr. Statter to Mr. Jones's firm, Messrs. Close & Co., of February 24, which was as follows: "Since meeting Mr. Jones to-day, I received a telegram from Mr. Van Buch (another director) asking me to write to you re capital of Corporation. The subscribed capital is nearly 56,000*l.*, and of the debenture issue of 20,000*l.*, 14,500*l.* are placed and the balance is held as security for a loan of 5000*l.*" Mr. Paine, on reading the letter, asked whether the debentures were secured by any trust deed which might cover the insurance to be assigned. Mr. Statter replied that they were not. "Nothing whatever," added Mr. Paine, "was said conveying to me in any way that there was anything in the form of debenture which could interfere with the security . . . I am positive no form of debenture was produced." Mr. Statter, who was to some extent corroborated by Mr. Scrutton, declared that a form was produced,

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and indeed read; but, after carefully considering the examination and cross-examination of these witnesses, I have come to the conclusion that no form was either shewn to Mr. Paine or read, and that he received no notice of the existence of the debentures beyond that which he states. I think I ought to add that Mr. Statter, on the part of the Corporation, practised, in my opinion, a reticence much to be regretted upon this occasion. I am unable to accept his assurance that it never struck him that the restrictive clause in the debenture materially affected the matter. The effect of that clause had been fully brought to his notice very shortly before, when the previous attempt to borrow had been made, and must, I think, have been present to his mind.

The deed was then executed, but was not delivered, as some doubt had arisen as to the amount of indebtedness which the Sun Fire Office was ready to admit. The deed stated the amount to be 2300*l.*, and the loan was to be 1900*l.* on that assumption; but on the following day, February 26, Mr. Paine learnt from the secretary that 1500*l.*, and no more, could be then admitted, and accordingly that sum was on the afternoon of the 26th inserted in the deed, and the loan reduced to 1400*l.* In its altered form it was delivered to Mr. Paine. The deed was made between the Corporation as mortgagors and the plaintiffs as mortgagees, and, after reciting the insurances by the mortgagors with the Sun Office, and that a claim had arisen entitling them to at least 1500*l.*, and that they had applied to the mortgagees for a loan of 1400*l.*, which the mortgagees had agreed to lend upon repayment being secured in the manner thereinafter appearing, proceeded to assign by way of security the insurances and all monies payable or to become payable thereunder. The mortgagors were to repay the loan, with interest at the rate of 20 per cent., on May 26 then next; or, if they repaid it earlier, then 20 per cent. was to be charged up to the date of such repayment, and thenceforward, until May 26, 15 per cent. Upon payment of principal and interest the policies were to be reassigned. At the interview between Mr. Jones and Mr. Paine, at which the deed was handed over, Mr. Van Buch, another director of the Corporation, was present, and on Mr. Paine again referring

to Mr. Statter's letter of February 24, added and signed the following postscript: "With the exception of the above debentures, there is no other loan." On February 27, Messrs. Paine, Son, & Pollock gave notice of the agreement of February 26 to the Sun Fire Office, and received an acknowledgment on the same day. Shortly after this date the defendant, on behalf of the debenture-holders, commenced an action against the Corporation, in which a receiver and manager was on March 20 duly appointed. In April the Corporation went into voluntary liquidation, and the receiver was appointed liquidator. On May 2 a supervision order was made, and leave was given to continue the debenture-holders' action. On June 15 the receiver and manager gave notice to the Sun Fire Office and to the plaintiffs that the debenture-holders claimed the insurance monies in priority to the plaintiffs. An action against the Sun Fire Office was shortly afterwards commenced, and these interpleader proceedings followed, in which I have now to determine the question of priority between the parties.

It was suggested, on the part of the plaintiffs, that they had, even prior to the Judicature Act, 1873, s. 25, sub-s. 6, a legal title; but it appears clear to me that, apart from the statute, their title was equitable and not legal, and that they could not in their own name have maintained an action. By virtue of the 25th section, sub-s. 6, they now can, no doubt, do so, because the mortgage is an absolute assignment not purporting to be by way of charge only: see *Tancred* v. *Delagoa Bay and East Africa Ry. Co.* (1) But their position is not thereby improved, for the sub-section expressly enacts that the assignee is to hold "subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed." I must, therefore, regard the question as one between two persons having equitable titles, both having a charge on the insurance fund, the title of the debenture-holders being first in point of time, but not perfected by notice to the insurance company until after the plaintiffs had given the company notice of their title. Now, there can be no doubt that, as a general rule, the giving of notice entitles the assignee who

(1) 23 Q. B. D. 239.

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gives it to priority over a previous assignee who has not given notice. But it is said that this rule does not apply between two equitable assignees, the first of whom holds a security in such a form as renders a notice by him practically impossible, but only between two successive assignees of a specific sum, where each can give a notice if he pleases. The foundation of the doctrine that he who gives the notice first has the better equity, was said to be the negligence to be imputed to the assignee who fails to give the notice: *Ryall* v. *Rowles* (1); *Dearle* v. *Hall* (2); *Loveridge* v. *Cooper* (3); *In re Freshfield's Trust.* (4) The mere failure to give it constitutes negligence, and it is equitable that the title of the assignee, who is thus guilty of negligence, should be postponed to that of him who uses diligence. Now here the debenture-holders were not, it was pointed out, in a position to give the Sun Fire Office a notice. Their charge was on the property of the Corporation generally. They were not the assignees of the insurance fund specifically, and were indeed ignorant of its existence. No negligence could, therefore, be charged against them; and it was contended, on this ground, that the doctrine of *Dearle* v. *Hall* (2) and the other cases referred to did not apply.

But I do not think that this view of the rule is supported by authority. It is, in my opinion, the giving of the notice which creates the priority (see *Foster* v. *Cockerell* (5)), and if the former assignee is prevented from giving the notice, either by contract with the assignor, as might often be the case, or by the nature of the charge which he holds, the same result should follow, as in a case where a prior assignee has negligently omitted to give the notice which he might have given. There does not appear to me to be any difference in principle between the case, first, of a person who can give the notice, but does not; second, of a person who has contracted not to give it; and third, of a person who, like the debenture-holders here, holds a security which, from its nature, prevents notice from being effectively given. In each case, I think, notice gives priority, unless the giver of it himself

(1) 1 Ves. Sen. 348.
(2) 3 Russ. 1.
(3) 3 Russ. 30.
(4) 11 Ch. D. 198.
(5) 3 Cl. & F. 456.

has either actual notice of the prior incumbrance, or else is in such a position and has such a degree of knowledge as is in equity equivalent to actual notice.

Now, in this case Mr. Paine, it is not disputed, knew that the Corporation had issued debentures, and it was proved that a debenture might, according to present usage, be in one of three forms. First, it might simply be an acknowledgment of debt under seal. Secondly,—and this is the more common form,—it might be an instrument not only acknowledging the debt, but charging the property of the company issuing it with repayment. Thirdly, it might be an instrument acknowledging the debt, charging the property of the company with repayment, and further restricting the company from giving any prior charge. Either of the two first-named forms would not in any way affect the priority of the plaintiffs. A mere acknowledgment under seal of indebtedness would not avail against an assignee of a specific fund; and it was decided in *Wheatley* v. *Silkstone and Haigh Moor Coal Co.* (1) that debentures in a form purporting to charge the property of the company with the debenture debt do not preclude a company from creating in the ordinary course and for the purposes of their business a charge in priority to the debenture-holders. It was, it would seem, in consequence of this decision that the third form of debenture was adopted, and both forms appear in Palmer's Precedents (ed. 1888). Mr. Paine had never, in fact, seen a debenture in the third form with the restrictive clause, and states that he had no suspicion after the interview of February 25 that the plaintiffs' security could be interfered with. All he knew was that debentures existed; and I think it must be taken that he did know that they were, at all events, in the form which had become usual in 1891, namely, that of "a floating security on the property present or future of the undertaking."

The defendant contends that, knowing so much, Mr. Paine ought to have insisted on seeing the debenture itself, when he would have discovered the restrictive clause; and the question in the cause really reduces itself to this, Was Mr. Paine's failure to look at the debenture or to make further inquiry into its

(1) 29 Ch. D. 715.

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contents that sort of negligence which ought to deprive the plaintiffs of the priority which their notice otherwise conferred upon them? The authorities cited upon this part of the case were very numerous, and appear to establish the principle that the negligence which will deprive a person who has done everything he can to complete his title to priority must be gross or culpable, must indeed be such a wilful shutting of the eyes to inquiry as amounts to evidence of fraud: see *Ware* v. *Lord Egmont* (1); *Montefiore* v. *Browne.* (2) Now, applying this principle to the present case, I do not think that, having regard to what passed at the interview of February 25, Mr. Paine can be held guilty of culpable negligence in not pursuing his inquiries further. Constructive notice of the restrictive clause cannot on that ground, in my opinion, be imputed to him, and he ought not to be affected with notice merely because he has omitted to do all that a cautious and prudent person would have done: Fisher on Mortgage, 3rd ed. vol. i. pp. 564, 565. But it was also urged that actual notice of the existence of debentures was enough to affect Mr. Paine with constructive notice of their form and contents, and that I ought to apply the rule according to which a purchaser or lessee having notice of a deed forming part of the chain of title of his vendor or lessor is said to have constructive notice of the contents of that deed. There seems, however, to be a clear distinction between documents which must necessarily, and those which may or may not, affect title: see *Jones* v. *Smith* (3); *Patman* v. *Harland.* (4) To the latter class the rule is not applicable, and it is to this class, in my opinion, that these debentures belong. In the result, then, I cannot impute constructive notice of the contents of the debentures to Mr. Paine, and my judgment must, therefore, be for the plaintiffs, with costs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Paine, Son, & Pollock.*

Solicitors for defendant: *Dowson, Ainslie, & Martineau.*

(1) 4 De G. M. & G. 460.
(2) 7 H. L. C. 241.
(3) 1 Hare, 43.
(4) 17 Ch. D. 353.

H. D. W.

GERRARD *v.* CLOWES.

1892
March 28.

Practice—Specially indorsed Writ—Common Money Bond—Penalty—8 & 9 *Wm.* 3, *c.* 11, *s.* 8—4 & 5 *Anne, c.* 16, *ss.* 12, 13—*Order* III., *r.* 6; *Order* XIII., *r.* 14; *Order* XIV., *rr.* 1, 4, 6.

It is competent to the plaintiff in an action upon a common money bond within the meaning of 4 & 5 Anne, c. 16, s. 12, to proceed under Order XIV. for the purpose of obtaining final judgment.

Tuther v. *Caralampi* (21 Q. B. D. 414) distinguished.

APPEAL against an order of Pollock, B., giving conditional leave to defend under Order XIV., r. 6.

The indorsement on the writ was as follows: "The plaintiff's claim is for 500*l.*, due upon the defendant's bond, dated November 1, 1890, in which sum the defendant became bound to the plaintiff, and which sum is due and owing from the defendant to the plaintiff. Particulars: Amount due under the said bond, 500*l.*"

The bond was under the defendant's seal for the payment to the plaintiff, her attorney, executors, administrators, or assigns, of 500*l.* It recited that the plaintiff was the holder of ten mortgage debentures of 25*l.* each in the British Stone and Marble Company, Limited, bearing interest at 10 per cent. from September 1, 1890, and that the defendant had agreed to guarantee to the plaintiff the payment of such principal and interest. The bond was subject to the condition that if the plaintiff should, on September 1, 1891, or on such earlier day, on which the monies secured might become payable according to the terms of the debentures, receive from the company the amount of the principal and interest due, or if the defendant, his heirs, executors, or administrators should, within twenty-eight days after receipt of notice from the plaintiff or her executors, administrators, or assigns, that the debentures had been dishonoured or payment thereof refused, pay to the plaintiff the amount of the principal and interest due, then the bond should be void, but should otherwise remain of full force and effect.

Shearman, for the defendant. There was no jurisdiction to

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make the order. In *Tuther v. Caralampi* (1), Lord Coleridge, C.J., and Hawkins, J., decided that Order XIV. was not applicable to an action on an annuity bond within 8 & 9 Wm. 3, c. 11, s. 8, because the plaintiff would not be entitled to final judgment for the penalty. Even if this is a common money bond within 4 & 5 Anne, c. 16, s. 12, Order XIV. is for the same reason excluded. The writ is also not specially indorsed within Order III., r. 6; for any claim on a bond is essentially a claim for damages.

C. M. Lush, for the plaintiff. There was jurisdiction to make the order. The case is not governed by *Tuther* v. *Caralampi*. (1) There the bond sued on was a bond with special conditions, and therefore, of course, a final judgment could not be obtained under Order XIV., r. 1. No single payment would discharge the covenant of the obligor, and the statutory procedure by suggestion of breaches, which is preserved by Order XIII., r. 14, involves assessment of damages, and that the judgment shall "remain as a security," entitling the obligee to a scire facias in case of further breaches. The case is wholly different as regards a common money bond within 4 & 5 Anne, c. 16, s. 12. Before the statute the Court of Chancery would cancel such a bond on payment by the obligor of the sum really due, and the effect of s. 13 is to enable similar relief to be granted. It follows that the obligee obtains "final judgment," as contemplated by Order XIV., r. 1, for a "debt or liquidated demand," according to Order III., r. 6. The amount is always a mere matter of calculation. The distinction between an annuity bond and a common money bond is pointed out in *Murray* v. *Earl of Stair* (2); *Smith* v. *Bond* (3); *Preston* v. *Dania*. (4)

Shearman, in reply.

A. L. SMITH, J. I think that Order XIV. can be used. In arguing that this writ is not a good specially indorsed writ, the learned counsel went beyond even the decision in *Sheba Gold Mining Co., Limited* v. *Trubshawe*. (5) The indorsement is really

(1) 21 Q. B. D. 414.
(2) 2 B. & C. 82.
(3) 10 Bing. 125.
(4) Law Rep. 8 Ex. 19.
(5) [1892] 1 Q. B. 674.

as good a special indorsement as it has ever been my lot to see. He says it is bad because it claims 500*l.*, whereas there can only be judgment for 250*l.*; and under rule 1 the application is "for liberty to enter final judgment for the amount indorsed." If this is so, Order XIV. will be brought to a standstill; but I have dealt with scores of summonses in which the plaintiff has claimed, for example, 100*l.* and taken 50*l.*, and rule 4 expressly says that "the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to, or as is admitted."

Tuther v. *Caralampi* (1) decides that Order XIV. cannot be used in an action on a bond on which breaches have to be assigned—that is, a bond under the statute of William. But a common money bond under the statute of Anne is a very different thing. In *Murray* v. *Earl of Stair* (2) Lord Tenterden says: "A bond for the payment of a sum certain at a day certain is not within the statute of William, for in order to ascertain the precise sum due in such a case computation only is necessary, and the intervention either of a jury or of a court of equity is unnecessary." I lay stress on this because of what was said as to the writ being indorsed with a claim for damages. In *Preston* v. *Dania* (3), Bramwell, B., says that a common money bond is within the statute of Anne, and not within the statute of William, "because only one breach can be assigned, and the penal sum is not for the performance of several covenants." Now the condition of this bond is, that if 250*l.* and interest at a definite rate is paid on a certain day the bond is to be void. The bond is, therefore, a bond "for the payment of a sum certain at a day certain," and a bond on which "only one breach can be assigned," and therefore a bond within the statute of Anne. Order XIV., therefore, applies, and the appeal will be dismissed. The defendant must pay into Court 250*l.*, or give security within a fortnight, otherwise the plaintiff will have final judgment for 250*l.*

LAWRANCE, J., concurred.

Appeal dismissed.

Solicitors for plaintiff: *R. G. Marsden & Wilson.*

Solicitors for defendant: *Tippetts & Son.*

(1) 21 Q. B. D. 414. (2) 2 B. & C. 82. (3) Law Rep. 8 Ex. 19.

H. D. W.

1892
May 23.

THE GOLD ORES REDUCTION COMPANY, LIMITED *v.* PARR.

Practice—Writ specially Indorsed—Sufficiency of Indorsement—Claim for Interest—Order III., *r.* 6; *Order* XIV., *r.* 1.

An indorsement of a claim for interest on a writ of summons, in order to be a good special indorsement, within the meaning of Order III., r. 6, and Order XIV., r. 1, must shew, either that the interest claimed is payable under an agreement, or that it is fixed by statute.

An indorsement on a writ stated that the claim was for instalments on shares in the plaintiff company, payable under terms of allotment, and for interest thereon at the rate of 10 per cent. per annum, from the respective dates when the instalments became payable until payment or judgment, and gave particulars of the instalments, with interest calculated accordingly, and claimed interest on the principal moneys at 10 per cent. from date of writ until payment or judgment. It appeared from an affidavit that by the articles of association 10 per cent. interest was payable:—

Held, that, as the writ did not shew that the interest was payable under an agreement, there was not a good special indorsement; and the fact that the affidavit shewed an agreement to pay interest could not make it good, and judgment could not be entered under Order XIV.

APPEAL from chambers.

The writ was issued on August 27, 1891.

The indorsement, so far as material, was as follows:—

"Statement of claim.

"The plaintiffs' claim is for money in which the defendant as a member of the plaintiff company is indebted to the plaintiffs (being a company incorporated under the Companies Act, 1862), for six instalments of 2*s.* per share each upon 250 shares in the company (allotted to the defendant as such member, at his request), payable monthly under terms of allotment (upon which shares, application and allotment moneys and the first two instalments have been paid by the defendant, and of which shares the defendant is the registered holder), and for interest thereon at the rate of 10 per cent. per annum from the respective dates when the same became payable to the date of payment or judgment, whereby an action has accrued to the plaintiffs.

		£.	s.	d.
" Particulars.				
" 1890, Sept. 20.	3rd instalment of 2s. per share on 250 shares . . .	25	0	0
	Interest thereon to date of writ	2	5	10
(Then followed five similar items of 25l. each with interest similarly calculated.)				
		£160	12	6
" Credit.				
" 1891, April.	By cash on account . . .	30	0	0
	10 per cent. interest thereon to date of writ	1	5	0
		£31	5	0
	Amount due .	£129	7	6

" Together with interest on 120l. principal moneys due at the rate of 10l. per cent. per annum from date of writ until payment or judgment."

The plaintiffs applied for liberty to enter judgment under Order XIV., and filed an affidavit, which set out a letter signed by the defendant, stating that he had paid 25l., being a deposit of 2s. per share on 250 shares of 1l. each in the plaintiff company, applying for 250 shares, and agreeing to accept the same subject to the memorandum and articles of association, and to pay 2s. per share on allotment and the balance by instalments of 2s. per share per month. The affidavit also verified the articles of association.

Article 20 provided as follows: "If before or on the day appointed for payment thereof, the call payable in respect of any share is not paid, the holder for the time being of such share shall pay interest on the amount of call at the rate of 10 per cent. per annum from the day appointed for payment thereof to the time of the actual payment thereof."

The master gave leave to defend, on the ground that the writ was not specially indorsed, as it claimed 10 per cent. interest without alleging any agreement to pay interest, and Denman, J., affirmed the master's order.

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The plaintiffs appealed.

Finlay, Q.C. (*Cecil Chapman*, with him), for the plaintiffs. This is a good special indorsement within the meaning of the recent decisions: *Ryley* v. *Master* and *Sheba Gold Mining Co.* v. *Trubshawe* (1); *Wilks* v. *Wood* (2); *London and Universal Bank* v. *Earl of Clancarty* (3); *Lawrence* v. *Wilcocks.* (4)

Interest at 10 per cent. is made payable by art. 20 of the articles of association subject to which the shares were allotted, and this constitutes a contract between the plaintiffs and the defendant. The last part of the judgment of the Court in *Sheba Gold Mining Co.* v. *Trubshawe* (5) shews that the indorsement on the writ is not necessarily conclusive, but the affidavits may be looked at to ascertain the nature of the claim. Here the affidavit shews that the interest claimed is payable by the terms of art. 20. It is not necessary in such an action as this to set forth the special matter: Companies Act, 1862 (25 & 26 Vict. c. 89), s. 70.

[A. L. SMITH, J. That relates to pleading, and was passed when Order XIV. did not exist.]

Vennell, for the defendant. The cases which have been referred to shew that Order XIV. can only apply to a claim for interest where the indorsement on the writ shews either that interest is payable under a contract, or that it is fixed by statute, as, in the case of a bill of exchange, by the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 57. The indorsement here does not state that interest is payable under a contract, and therefore shews no legal liability to pay interest. The indorsement ought to make it clear to the defendant what the nature of the claim against him is, and he ought not to be obliged to search the articles of association in order to ascertain. There is nothing in the authorities cited for the plaintiffs to shew that the affidavits can be used for the purpose of supporting a special indorsement which is invalid on the face of it.

Chapman, replied.

(1) [1892] 1 Q. B. 674.
(2) [1892] 1 Q. B. 684.
(3) [1892] 1 Q. B. 689.
(4) [1892] 1 Q. B. 696.
(5) [1892] 1 Q. B. at p. 683.

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MATHEW, J. This appeal must be dismissed. It is most important that a defendant should know from the writ what the exact claim against him is. The cases which have been referred to in argument establish that, in order to constitute a good special indorsement, within the meaning of Order III., r. 6, and Order XIV., r. 1, the writ should shew that interest claimed is payable under a contract, or, as in the case of a bill of exchange, is an amount fixed by statute. In the present case the writ does not shew that the 10 per cent. interest which is claimed is payable under any contract. A passage in the judgment of the Court in *Sheba Gold Mining Co.* v. *Trubshawe* (1) is relied upon for the plaintiffs as shewing that the affidavits may be looked at in order to prove how the claim arose. That case, however, was decided on the form of the indorsement, and on the form only; but the Court, having come to the conclusion that the indorsement was defective, looked at the affidavits, and found that the plaintiff ought not to have treated the claim for interest as a liquidated demand.

A. L. SMITH, J. I am of the same opinion. The law has been completely settled by the recent decisions, and it is established beyond doubt that where interest is claimed by a specially indorsed writ it must either be payable by agreement or fixed by statute. In the present case the writ was issued in August, 1891. At that time it might have passed muster as a valid specially indorsed writ; but the law has since been explained in such a way as to shew that the indorsement is invalid. There is nothing on this writ to shew that the interest is payable by agreement or fixed by statute, and therefore the indorsement is contrary to the law as laid down subsequently to the date of the writ. It is contended that the judgment in *Sheba Gold Mining Co.* v. *Trubshawe* (1) shews that the indorsement is not necessarily conclusive, and that the affidavits may be looked at; but what was said there was that although the claim might be correct in form, if it appeared in fact that the interest was claimable only as damages, there would not be a good special

(1) [1892] 1 Q. B. at p. 683.

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indorsement. This does not support the present plaintiffs' contention.

Appeal dismissed.

Solicitor for plaintiffs: *Arthur Heiron.*

Solicitor for defendant: *H. C. Barker.*

P. B. H.

1892

May 13.

SAUNDERS AND ANOTHER *v.* WIEL.

Practice—Interrogatories—Action for Penalties—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 58.

By s. 58 of the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), which prohibits infringements of copyright in registered designs, it is enacted that "Any person who acts in contravention of this section shall be liable for every offence to forfeit a sum not exceeding 50*l.* to the registered proprietor of the design, who may recover such sum as a simple contract debt by action":—

Held, that the sum so forfeited must be taken to be a penalty, and that the plaintiff in an action to recover such sum is consequently not entitled to interrogate the defendant.

Adams v. *Batley* (10 Q. B. D. 625) distinguished.

APPEAL from chambers.

The plaintiffs, who were registered under the Patents, Designs, and Trade Marks Act, 1883, as the proprietors of a certain design, sued the defendant to recover 100*l.* as penalties under s. 58 of that Act for infringements of their copyright in such design. The plaintiffs, the defendant not opposing, obtained leave to administer interrogatories, and in pursuance of such leave interrogated the defendant as to the commission of the infringements charged. The defendant objected to answer the interrogatories on the ground that his answers might make him liable to the penalties sought to be recovered. The master disallowed the objection, and made an order that the defendant should answer. On appeal, Denman, J., referred the matter to the Court.

Danckwerts, for the defendant. The sum sought to be recovered is a penalty imposed by way of punishment. Sect. 58 makes piracy of a registered design an "offence" in respect of which the offender is to "forfeit" a sum not exceeding 50*l.*; and

s. 59 (1), in terms, refers to such sum as a "penalty." And in an action for penalties interrogatories by the plaintiff are not allowed: *Martin* v. *Treacher*. (2)

E. Morten, for the plaintiffs. The 50*l*. penalty given by s. 58 is a penalty only in name, and is not a penalty within the rule that interrogatories cannot be administered in a penal action. It is given by way of compensation to the injured party, not by way of punishment of the defendant. It is intended to represent the plaintiff's real damage in cases in which, the damage being small, the plaintiff has a difficulty in proving it. The fact that the statute speaks of the infringement as an offence, and the sum recoverable as a penalty, does not by any means conclude the question: per Lord Esher, M.R., in *Adams* v. *Batley*. (3) The present case is on all fours with *Adams* v. *Batley* (4), where it was held that an action to recover 40*s*. for infringement of musical copyright under 3 & 4 Wm. 4, c. 15, s. 2, was not a penal action so as to preclude the plaintiff from interrogating the defendant. There, as here, the statute spoke of the defendant as an offender. There the sum recoverable was "not less than 40*s*." And Lord Esher, at p. 630, says: "If that payment is a penalty, who is to assess the amount? Ought the jury to settle it, and, if so, upon what considerations? Are they to look at the conduct of the defendant, or upon what are they to act? I can see no characteristic of a penalty in this payment." That observation applies with equal force to the present statute, for the sum recoverable under s. 58 is not a fixed amount, as is invariably the case with sums recoverable by common informers, but a sum "not exceeding 50*l*." The notion of a jury assessing the amount of the punishment for a crime is altogether foreign to English procedure. *Martin* v. *Treacher* (2) is not in point. That case only shews that common informers cannot interrogate; whereas this is an action by a party aggrieved. In *Jones* v. *Jones* (5), it was indeed held that an action for pound breach, in which the

(1) By s. 59: "Notwithstanding the remedy given by this Act for the recovery of such penalty as aforesaid, the registered proprietor of any design may (if he elects to do so) bring an action for the recovery of any damages arising" from any of the acts of piracy prohibited by s. 58.

(2) 16 Q. B. D. 507.

(3) 18 Q. B. D. at p. 631.

(4) 18 Q. B. D. 625.

(5) 22 Q. B. D. 425.

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plaintiff claims treble damages, is a penal action within the rule as to discovery; but there the sum recoverable is clearly by way of punishment. So, too, the action for double value of goods fraudulently removed by a tenant to avoid distress is penal, as was held in *Hobbs* v. *Hudson*. (1) But here there is nothing to shew an intention to do anything more than compensate the plaintiff.

DAY, J. This is an action brought under s. 58 of the Patents, Designs, and Trade Marks Act, 1883, to recover a sum of money for acts done by the defendant in contravention of that section; and the plaintiffs, in support of their claim, have administered interrogatories to the defendant which they seek to compel him to answer. The question whether they are entitled to do so depends upon whether the sum so claimed is to be regarded as a penalty or as liquidated damages. I am clearly of opinion that it is to be regarded as a penalty, and that consequently the interrogatories need not be answered. Sect. 58 provides, that "it shall not be lawful" for any person to do any of the acts therein specified, and that "any person who acts in contravention of this section shall be liable for every offence to forfeit a sum not exceeding 50*l*." That language points to the punishment of an offence, not to compensation for an injury. However, if there were any doubt about the matter, s. 59 sets it entirely at rest, for it speaks of the money recoverable under s. 58 as "such penalty as aforesaid." The case of *Adams* v. *Batley* (2), upon which the plaintiffs relied, does not, in my judgment, assist them. That decision was under a different statute, in which the language was very different. The statute there in terms speaks of the 40*s*. as "damages," and it was upon that ground that the Court of Appeal decided the case as they did. That decision wholly turned upon the special language of the Act.

CHARLES, J., concurred.

Appeal allowed.

Solicitors for plaintiffs: *Gresham, Davies, & Dallas.*
Solicitors for defendant: *Maddisons.*

(1) 25 Q. B. D. 232. (2) 18 Q. B. D. 625.

J. F. C.

THE QUEEN *v.* MAYOR AND JUSTICES OF BODMIN.

1892
May 7.

Practice—Mandamus—Second Application after Discharge of First—Fresh Materials.

Where a rule for a mandamus to compel a corporation to perform a statutory duty has been discharged, on the ground that no demand and refusal have taken place, the Court will not grant another rule for a mandamus for the same purpose, although a demand and refusal have taken place since the discharge of the former rule.

Ex parte Thompson (6 Q. B. 721) followed.

RULE NISI for a mandamus to the mayor and justices of the borough of Bodmin, calling upon them to appoint a fit person to be their clerk.

It appeared from the affidavits that on October 12, 1891, the clerk to the justices died. Mr. Collins was at that time mayor of the borough. His tenure of office would terminate on November 9, but by virtue of s. 155 of the Municipal Corporations Act, 1882, he would continue to be a justice of the peace for the borough during the year next after his mayoralty. On November 9, Mr. Collins resigned his position as town councillor, and announced his intention of becoming a candidate for the vacant clerkship. The election was held on November 14, the candidates being Mr. Collins and Mr. Edyvean. Five justices voted for Mr. Edyvean, and three justices and the mayor, and Mr. Collins himself, for Mr. Collins. The numbers being equal, the mayor gave a casting vote for Mr. Collins, and declared him to be duly elected. Mr. Edyvean contended that the election was invalid, on the grounds that Mr. Collins as a justice was disqualified from holding the office, and that the mayor had no casting vote, and he obtained a rule nisi for a mandamus calling upon the mayor and justices to appoint a fit person to be their clerk. On the rule coming on for argument, objection was taken that there had not been any demand made upon and refusal by the mayor and justices to appoint a fit person; and on this ground the Court (Hawkins and Collins, JJ.) discharged the rule. A demand having been formally made and refused, Mr. Edyvean again obtained a rule

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nisi for a mandamus in similar terms, which now came on for argument.

Pitt Lewis, Q.C. (*Foote,* with him), on behalf of the mayor and justices, shewed cause. The Court will not grant a second rule for a mandamus where a former rule has been discharged, even although a demand and refusal have taken place since the discharge of the first application: *Ex parte Thompson.* (1) Persons applying to the Court for a prerogative writ must come prepared with all their materials on the first application: *Reg.* v. *Manchester and Leeds Ry. Co.* (2); *Rex* v. *Orde* (3); *Reg.* v. *Great Western Ry. Co.* (4); *Reg.* v. *Pickles.* (5)

[He was stopped by the Court.]

Asquith, Q.C., and *Roskill,* in support of the rule. *Reg.* v. *Manchester and Leeds Ry. Co.* (2) and *Rex* v. *Orde* (3) are cases of certiorari and quo warranto, and do not apply to the case of a mandamus. In *Reg.* v. *Great Western Ry. Co.* (4) there was no ground for the second application which might not have been presented before. *Ex parte Thompson* (1) has never been followed, and was a refusal to grant a rule nisi. Here the rule nisi has been granted, and the Court will not now discharge the rule on a merely technical ground. The rule laid down in *Ex parte Thompson* (1) is not invariable: *Reg.* v. *Deptford Pier Co.* (6); Tapping on Mandamus (edition of 1848), pp. 294, 295; *Ex parte Inhabitants of Carlton High Dale.* (7) There is power to amend. (C. O. R. 1886, r. 299.)

Pitt Lewis, Q.C., in reply. In *Reg.* v. *Deptford Pier Co.* (6) the objection was not taken.

DAY, J. This is an application to make absolute a rule nisi for a mandamus to the mayor and justices of Bodmin, calling on them to appoint a fit person to be their clerk. The counsel for the defendants, in shewing cause against the rule, has taken a preliminary objection which, as it goes to the root of the matter, we

(1) 6 Q. B. 721.
(2) 8 A. & E. 413.
(3) 8 A. & E. 420, n.
(4) 5 Q. B. 597.
(5) 3 Q. B. 599, n.; 12 L. J. (Q.B.) 40.
(6) 8 A. & E. 910.
(7) 4 N. & M. 312.

have desired to hear argued out at length in the first instance. He says that as precisely the same rule has been applied for and discharged before for precisely the same purposes and in precisely the same terms, we have no power to grant it on a second application. He alleges that there is a well-established practice of the Courts that after an application for a prerogative writ has been made, argued, and refused, it is not competent to the applicant to make any further application for the same writ. The facts in the present case are not in dispute. As I read the authorities, it has always been held, whenever this objection has been taken and the attention of the Courts has been called to the point, that no second application for a prerogative writ will be granted when the first application has been discharged. There are many authorities which support this contention; but I think, apart from authority, that it is a most convenient view to take of the jurisdiction of the Court in such matters. It is a view which has commended itself to many judges who have acted upon it, and it commends itself to me. It is no doubt extremely convenient that no second application for a high prerogative writ should be allowed after a first application has been refused. Such a writ is an extraordinary remedy, and persons seeking it may very reasonably be required not to apply for it unless they have sufficient cause for doing so. They must come prepared with full and sufficient materials to support their application, and if those materials are incomplete, I think it is quite right that they should not be allowed to come again. The rule, as I have said, is well established, and it is laid down by Lord Denman in *Ex parte Thompson* (1)—a case which is not distinguishable from the present case. It is true that in the case of *Reg.* v. *Deptford Pier Co.* (2) a second application for a mandamus was granted; but the point does not there seem to have been brought to the attention of the judges. In my opinion, the case of *Ex parte Thompson* (1) is binding on us as shewing the practice of the Courts. I think we are bound to conform to that practice, and that we have no right to take on ourselves to vary or alter it. That decision is an authority which guides and controls the exercise of our discretion. It is essential that the rules of

(1) 6 Q. B. 721.

(2) 8 A. & E. 910.

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practice from time to time laid down by the Courts should be followed.

But even if it were competent to us to waive this rule of practice, I should not feel inclined to do so here. I cannot shut my eyes to the fact that the rule would almost certainly have been discharged on other grounds. In one sense, the office of clerk to the justices is now filled, and the justices, if called upon to appoint, might appoint the present occupant of the office. Nor can it be said that justice is defeated, or that the affairs of the borough are at a standstill, since there is a person who is fulfilling the duties of the office. Then, again, the justices can dismiss their clerk at pleasure; and therefore, even supposing that they did obey the mandamus by appointing as clerk some one other than the present holder of the office, there is nothing to prevent them from dismissing the person so appointed the next day. I think, therefore, that there is here no reason for departing from the well-established practice of the Courts, and that this rule must be discharged.

CHARLES, J. I am of the same opinion. It is said that *Ex parte Thompson* (1) forms an exception to the current of authority. I cannot so read the words of Lord Denman; on the contrary, after having his attention pointedly drawn to the new state of facts created by the demand and refusal since the former application for the writ, he says: "We have often refused rules on this ground; we cannot have the same application repeated from time to time." That was a precisely analogous case to the present case, and I cannot see my way to depart from the practice there laid down. It is said, no doubt, in Tapping on Mandamus, that the Court will entertain a second application after the refusal of the first; but on reference to the authority cited in support of the proposition (*Ex parte Inhabitants of Carlton High Dale* (2)), it turns out that that was not a case of the former application having been refused, but that there, it being found on the application for the rule in the first instance that the materials were insufficient, the application was withdrawn and renewed on a future occasion. That case, therefore, is no authority for saying that the Court

(1) 6 Q. B. 721. (2) 4 N. & M. 312.

will grant a second application for a mandamus after refusing the first application. I agree that this rule must be discharged.

Rule discharged.

Solicitors for applicant: *Sharpe, Parkers, Pritchards, & Barham, for R. P. Edyvean, Bodmin.*

Solicitors for respondents: *Coode, Kingdon, & Co., for J. R. Collins, Bodmin.*

A. P. P. K.

HAMILTON, APPELLANT *v.* WALKER, RESPONDENT.

1892 *May 4.*

Justices — Practice — Two Informations on same Facts — Different Offences charged—Hearing of Second Information before Decision of First—Illegality of Conviction.

Two informations were preferred against the appellant under the Indecent Advertisements Act, 1889 (52 & 53 Vict. c. 18); the first, under s. 4, charging him with delivering to a certain person indecent advertisements, with intent that the same should be delivered or exhibited; and the second, under s. 3, charging him with aiding, abetting, counselling, and procuring the same person in the commission of the offence of exhibiting the same advertisements. The facts relating to the two charges were the same. After hearing the first information, the justices proceeded with and heard the second; and after the second had been heard, the appellant was convicted of the offence charged in the first. He was also convicted on the second information :—

Held, that each case ought to have been decided on the evidence given with relation to the particular charge, and therefore the justices were wrong in hearing the evidence on the second information before deciding on the first, and both convictions were bad.

CASE stated by justices.

On February 22, 1892, at the petty sessions holden at Sale, in the division of Altrincham, in the county of Chester, an information preferred by the respondent against the appellant, under s. 4 of the Indecent Advertisements Act, 1882 (52 & 53 Vict. c. 18), was proceeded with and heard, charging that on January 2, 1892, the appellant, at Altrincham, unlawfully did deliver to one Thomas Wright certain indecent advertisements, as defined by the Act, with the intent that the same, or some one or more thereof, should be delivered and exhibited to certain inhabitants and persons then being in or passing along the streets in Altrincham.

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There was also, at the same time and place, another information, charging that, at the place and day before mentioned, Thomas Wright did exhibit the said advertisements, as in the first information charged, and that the appellant did aid, abet, counsel, and procure Thomas Wright in the commission of the said offence, under s. 3 of the Act.

After the hearing of the first information the justices determined to proceed with and hear the second information; and having so proceeded with and heard the same, the appellant was thereupon duly convicted of the offence in the first information charged.

The evidence set out in the case, so far as it is material to the point decided (1), was as follows:—

On January 1, 1891, a parcel of printed matter was delivered at the railway station at Liverpool addressed to Wright at Altrincham. On January 2 the parcel was received at Altrincham railway station, and taken away by Wright, who then scattered in the streets a number of copies of an indecent pamphlet which the parcel contained. The parcel was seized, and Wright was convicted of exhibiting indecent advertisements, and sentenced. The pamphlet purported on the face of it to be issued by the appellant, and referred to an address in Liverpool, which was ascertained to be the appellant's address.

The question for the opinion of the Court was whether, on the facts stated, a conviction could be legally had and made at the same time under s. 4 of 52 & 53 Vict. c. 18, and also under s. 3 of the same Act.

A second case was stated, relating to the second conviction. The facts were the same.

Hopwood, Q.C. (*Dr. Commins*, with him), for the appellant. The two charges were improperly heard together, and what has been done amounts in substance to two convictions for the same offence. The course adopted by the magistrates, in reserving their judgment on the first information until after they had heard the evidence given on the second, is a violation of the

(1) Other questions were raised, as to the sufficiency of the evidence to support the convictions, but it became unnecessary to decide them.

provisions of Jervis's Act (11 & 12 Vict. c. 43), ss. 10, 14. A defendant who is called upon to answer a second charge on the same facts ought not to be deprived of the opportunity of raising the point that he has already been either convicted or acquitted, as the case may be. The law as to this point is correctly stated in Paley on Summary Convictions, pages 154, 155, 6th edition: "Consequently at common law a former conviction or acquittal, whether on a criminal summary proceeding or an indictment, will be an answer to an information of a criminal nature before justices founded on the same facts. The true test to shew that such previous conviction or acquittal is a bar, is whether the evidence necessary to support the second proceeding would have been sufficient to procure a legal conviction on the first."

J. Eldon Bankes, (*Clement Higgins*, *Q.C.*, and *J. G. Pease*, with him), for the respondent. The point now taken on behalf of the appellant is not raised by the case.

[VAUGHAN WILLIAMS, J. Any point of law which arises from the facts stated in the case can be taken and decided, whether the specific question is asked or not: *Knight* v. *Halliwell*. (1)]

There were two separate and distinct informations for two separate and distinct offences; therefore Jervis's Act does not apply. It is consistent with the case stated that the magistrates may have made up their minds as to whether the appellant ought to be convicted on the first information or not before they proceeded to hear the evidence on the second. If they heard the evidence with a view to determining the question of punishment, there can be no objection to the course which they have taken.

POLLOCK, B. This case raises some important questions, which it is unnecessary to decide, because there is one short point which disposes of the case. There were two charges against the appellant, for two independent offences, first, unlawfully delivering indecent advertisements with intent that they should be exhibited, contrary to s. 4 of the Indecent Advertisements Act, 1889 (52 & 53 Vict. c. 18), and, secondly, aiding and abetting the person to whom the advertisements were delivered

(1) Law Rep. 9 Q. B. 412.

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Pollock, B.

in exhibiting such advertisements, contrary to s. 3 of the same Act. The magistrates heard the evidence given on the first charge, and then, as they themselves state in the case, after the hearing of the first information, they determined to proceed with and hear the second information; and having so proceeded with and heard the same, the appellant was thereupon duly convicted of the offence in the first information charged. The question asked in the case as to this point is "whether on the facts as above stated a conviction could be legally had and made at the same time under s. 4 of 52 & 53 Vict. c. 18, and also under s. 3 of the same Act." Giving a fair construction to the findings on the facts, I am of opinion that the conviction cannot be sustained. The magistrates heard the second charge substantially on the same evidence as had been given on the first. It is true that the case does not come within the letter of s. 10 of Jervis's Act (11 & 12 Vict. c. 43), but it is within the spirit of the criminal law, a well-known principle of which is that each case ought to stand on its own merits, and should be decided on the evidence given with relation to that particular charge.

VAUGHAN WILLIAMS, J. According to the facts found in the case there were two charges of separate and distinct offences against separate and distinct sections of the Act. The magistrates heard the first case, and reserved judgment. They then heard the second, "and having so proceeded with and heard the same the appellant was *thereupon* duly convicted of the offence in the first information charged," as they say themselves in their statement of facts in the case. I am of opinion that this course of procedure makes both convictions bad; the first because the magistrates were bound to decide on the evidence given with respect to that particular charge, and the second because the defendant had a right to be in a position to set up the defence that he had already been either convicted or acquitted, as the case might be, on the same facts. It is clear that if there had been a proper conviction on the first charge the second could not properly have been tried afterwards, because, if it were, the defendant would, in substance, though perhaps not in form, be tried twice for the same offence. The test is to take the evidence

on the second charge, and see whether it would be sufficient to convict if brought forward on the first. It is clear that in the present case, so far as the point we are deciding is concerned, it would be sufficient.

Conviction quashed.

Solicitors for appellant: *Bell, Brodrick, & Gray, for Cecil B. Taylor, Liverpool.*

Solicitors for respondent: *Bower, Cotton, & Bower, for J. Harris, Altrincham.*

P. B. H.

THE QUEEN *v.* THE JUSTICES OF ANGLESEY.

1892
May 11.

Justices — Practice — Appeal — Court of Summary Jurisdiction — Appeal to Quarter Sessions—Deposit instead of Recognizance—Power to allow Deposit —"Court before whom Appellant appears to enter into Recognizance"— Summary Jurisdiction Act, 1879 (42 & 43 *Vict. c.* 49), s. 31, *sub-ss.* 2, 3.

By the Summary Jurisdiction Act, 1879, s. 31, sub-s. 2, the appellant from an order of a court of summary jurisdiction shall, within seven days after the decision, give notice in writing of his intention to appeal, and of the general grounds of such appeal.

By sub-sect. 3, the appellant shall, within three days after giving notice of appeal, enter into a recognizance, or "may, if the court of summary jurisdiction before whom the appellant appears to enter into a recognizance think it expedient," make a deposit instead.

A court of summary jurisdiction made an order, and, on the same day, gave leave to the person affected by the order, who intended to appeal, to make a deposit, and fixed the amount. Four days later, notice of appeal was given. The court of quarter sessions refused to hear the appeal.

On application for a mandamus to compel the sessions to hear the appeal:—*Held*, that the intention of s. 31, sub-ss. 2, 3, of the Summary Jurisdiction Act, 1879, was that the Court allowing a deposit should have the notice of appeal before them, and the allowance before the notice of appeal had been given was invalid, and therefore the refusal to hear the appeal was right.

A RULE nisi had been obtained for a mandamus to the Justices of Anglesea, directing them to enter continuances and hear an appeal against an order of affiliation. The summons came on for hearing on March 21. The defendant did not give evidence himself, alleging that he was taken by surprise in consequence of the absence of witnesses whom he had expected to be in attendance, and an order was made. The defendant expressed his

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intention of appealing against the order, and thereupon the Court which had made the order gave him permission to make a deposit by way of security, instead of entering into a recognizance, and fixed the amount of such deposit at 20*l.* On March 24 the defendant deposited 20*l.*, and gave written notice of appeal, which reached the complainant on the 25th.

When the appeal came on for hearing, it was objected on behalf of the complainant that the defendant had not duly complied with the provisions of s. 31, sub-s. 3, of the Summary Jurisdiction Act, 1879. (1) The Court gave effect to this objection, and refused to hear the appeal. The defendant applied to the Court to state a case for the opinion of the High Court. The Court acceded to the application, but the defendant afterwards abandoned the case, and applied for a mandamus.

Gore, in shewing cause, objected that the defendant having applied for and obtained, and afterwards abandoned, a case, could not proceed by mandamus. [He cited *Rex* v. *Justices of West Riding* (2); *Rex* v. *Justices of Suffolk*. (3)]

(1) The Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 31, which gives an appeal to quarter sessions from orders of courts of summary jurisdiction, provides, by sub-s. 2, that, "The appellant shall, within the prescribed time, or if no time is prescribed, within seven days after the day on which the said decision of the Court was given, give notice of appeal by serving on the other party, and on the clerk of the said court of summary jurisdiction, notice in writing of his intention to appeal, and of the general grounds of such appeal."

By sub-sect. 3: "The appellant shall, within the prescribed time, or if no time is prescribed, within three days after the day on which he gave notice of appeal, enter into a recognizance before a court of summary jurisdiction, with or without a surety or sureties as that Court may direct, conditioned to appear at the said sessions and to try such appeal, and to abide the judgment of the Court of Appeal thereon, and to pay such costs as may be awarded by the Court of Appeal, or the appellant may, if the court of summary jurisdiction before whom the appellant appears to enter into a recognizance think it expedient, instead of entering into a recognizance, give such other security, by deposit of money with the clerk of the court of summary jurisdiction or otherwise, as that Court deem sufficient."

By sect. 49: "Prescribed" means, in the present case, prescribed or provided by the Bastardy Acts, and those Acts do not now contain any provisions as to the time for giving notice of appeal or entering into recognizances.

(2) 1 A. & E. 606.

(3) 6 A. & E. 109.

Avory, contrà. The court of quarter sessions has no power to state a case on a preliminary objection. A case can only be stated where the Court has heard and determined. The case, therefore, which was applied for and granted under a mistake, was rightly abandoned, and such abandonment cannot prejudice the right to apply for a mandamus. [He referred to *Reg.* v. *Overseers of Sutton Coldfield.* (1)]

The Court overruled the objection.

Gore, shewed cause against the rule for a mandamus. Sect. 31, sub-s. 3, of the Summary Jurisdiction Act, 1879, expressly requires the deposit to be approved by "the court of summary jurisdiction before whom the appellant appears to enter into a recognizance," which is to be done within three days after the day on which notice of appeal is given. Here the deposit was approved by a Court which sat on March 21, and notice of appeal was given some days later. It is contrary to the language of the statute to say that the Court which sat on the 21st can be the Court which, by s. 31, sub-s. 3, is to approve the deposit. The object of the Act is that the Court shall have before them the notice of appeal, which is to state the grounds of appeal, to enable them to come to a correct conclusion as to the nature of the case to be raised by the appeal, and to fix the amount of the deposit accordingly.

Avory, in support of the rule. The provisions as to proceedings in appeals are only directory, provided each step is taken within the prescribed time. Here none of the proceedings were out of time. The Court which sat on March 21 was specially qualified to deal with the question of deposit, having heard the case, and being acquainted with the facts. The objection to the application to allow a deposit is that it was made earlier than it need have been, which cannot be a valid ground of objection. If effect were given to the contention on the other side, inconvenience would be caused, owing to the length of the intervals between the sittings of courts of summary jurisdiction in country districts. [He referred to *Chapman* v. *Robinson* (2); *Stanhope* v. *Thorsby.* (3)]

(1) Law Rep. 9 Q. B. 153. (2) 1 E. & E. 25; 28 L. J. (M.C.) 30.
(3) 35 L. J. (M.C.) 182.

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DAY, J. I am of opinion that the rule ought to be discharged.

The Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 31, sub-s. 3, provides that a recognizance shall be entered into, and prescribes the time within which it shall be entered into, namely, three days after the giving of notice of appeal. Sub-s. 2 provides that notice of appeal is to be given within seven days after the decision, and by sub-s. 3, within three days after notice of appeal has been given the appellant is to enter into a recognizance. The notice of appeal must set out the general grounds of appeal. The appeal may be on a question of law, or it may be on a simple issue of fact, or it may be on a complicated state of facts necessitating the production of a number of witnesses. Sect. 31, sub-s. 3, provides that if the Court before whom the appellant appears to enter into a recognizance think it expedient, they may allow a deposit instead of a recognizance. The Court have to consider what sum ought to be deposited, and they ought, therefore, to have before them the notice of appeal and the grounds of appeal; it is not enough that they should be acquainted with the evidence given and the facts proved at the hearing. Here the Court, which fixed the amount of the deposit at 20*l.*, had no grounds of appeal or notice of appeal before them, and the appellant had not appeared before them to enter into a recognizance. The only Court which by the statute is competent to dispense with the recognizance is "the court of summary jurisdiction before whom the appellant appears to enter into a recognizance." The allowance of a deposit was intended to be made several days after the decision, and some days after notice of appeal has been given.

CHARLES, J. I regret to be obliged to come to the same conclusion, but the case is governed by the express provisions of s. 31, sub-ss. 2 and 3, of the Summary Jurisdiction Act, 1879. If the case had been like the cases cited by Mr. Avory, turning on 20 & 21 Vict. c. 43, or if it had been merely a case of entering the appeal sooner than was necessary, I should have thought that the appeal ought to have been heard. But in the present case the wrong Court has allowed the deposit. Reading the two sub-

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sections together it is clear that the intention was to have the notice of appeal and the grounds of appeal before the Court which was to be asked to allow a deposit, so as to put the Court in possession of facts which would enable them to fix a reasonable amount. That is not the case here. The earlier cases have no application, being distinguishable on the ground that here the deposit was allowed by the wrong Court.

Rule discharged.

Solicitors for the prosecution: *Winter & Co., for David Brown & Griffiths, Bangor.*

Solicitors for the justices: *Peacock & Goddard, for S. R. Dew, Bangor.*

P. B. H.

[IN THE COURT OF APPEAL.]

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May 17.

VESTRY OF ST. GILES, CAMBERWELL *v.* CRYSTAL PALACE COMPANY.

Metropolis—Management Acts—"New Street"—Paving, Liability for Expenses of—Old Highway converted into Street by Building—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 105—*Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 112.

By s. 105 of the Metropolis Management Act, 1855, in case the owners of the houses forming the greater part of "any new street laid out or made, or hereafter to be laid out or made," which is not paved to the satisfaction of the vestry or district board, be desirous of having the same paved, or if such vestry or board deem it necessary or expedient that the same should be so paved, then such vestry or board may pave the same, and the expenses are to be charged on the owners of the houses forming such street. By s. 250 the word "street" shall apply to and include any highway.

By s. 112 of the Metropolis Management Amendment Act, 1862, which is to be construed together with the before-mentioned Act, "the expression 'new street' shall apply to and include all streets hereafter to be formed or laid out, and a part of any such street, and also all streets, the maintenance of the paving and roadway whereof had not, previously to the passing of this Act, been taken into charge and assumed by the commissioners, trustees, surveyors, or other authorities having control of the pavements or highways in the parish or place in which such streets are situate, and a part of any such street, and also all streets partly formed or laid out," and "the word 'pave' shall apply to and include the formation of the roadway or footway of any street."

Held, that s. 112 of the Metropolis Management Amendment Act, 1862, does not restrict the meaning of the expression "new street," and therefore

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that that expression, as used in s. 105 of the Metropolis Management Act, 1855, includes a new street in the ordinary and popular sense of the term. An ancient country highway which became a "new street" in that sense, by the erection of buildings fronting it, shortly before, or after the passing of the Metropolis Management Act, 1855, is within the terms of s. 105 of that Act, and the expense of paving it may be charged upon the owners under that section.

Pound v. *Plumstead Board of Works* (Law Rep. 7 Q. B. 183) followed.

APPEAL from the judgment of Day, J., at the trial without a jury.

The action was brought by the plaintiffs, the vestry of the parish of Camberwell, to which the Metropolis Management Acts applied, to recover a proportional part of the estimated cost and expenses of paving a street called the Crystal Palace Parade from the defendants, as owners of houses and land abutting on such street.

The facts were in substance as follows. Prior to 1853 there was an ancient highway or lane, leading from Norwood to Sydenham and Dulwich, part of which was situate in the parish of Camberwell. Repairs to such highway, such as scraping the road and cleaning out the ditches, had been done by the surveyors of highways for the parish. By the Crystal Palace Company's Acts, 1853 and 1854 (16 Vict. c. xx. and 17 & 18 Vict. c. xciii.), provisions were enacted whereby (in substance) the company were empowered to divert a portion of this road, forming the north-western boundary of that part of the company's land on which the Crystal Palace was then being erected, and to construct a wider road; and it was provided that, as soon as the road was so diverted and widened, it should be dedicated to the public, and be vested in the same persons in whom the other part of the said road there was vested. Under these powers the company constructed a new road, which included small portions of the site of the old road, but was mainly on a new site. This was the road in question in the action. On January 1, 1856 (the date at which the Metropolis Management Act, 1855, came into operation), the Crystal Palace occupied substantially the whole of one side of the road, there being no buildings on the other side. Subsequently to that date the London, Chatham and Dover Railway Company constructed a railway and railway

station on the other side of the road. The station, which was at one end of the road, was at a lower level than the road, approached by steps leading down therefrom, but the wall and roof of the station abutted on and rose above the level of the roadway. Next to the station on that side of the road, and separated from the road by a wall or paling, were a cutting in which the railway ran and the top of a tunnel; and the remainder of that side of the road was occupied by four dwelling-houses fronting the road, which were also proved to have been erected after January 1, 1856. The exact dates of the making of the railway and the erection of these houses were not proved. The new road constructed by the defendants was a macadamized road. It had since its construction been repaired by the defendants voluntarily, but no repairs had been done to it by the vestry. In 1890 the plaintiffs passed a resolution that it was necessary and expedient that it should be paved, and apportioned the estimated cost and expenses of paving the same among the several owners of houses and lands abutting thereon.

The learned judge gave judgment for the plaintiffs for the amount claimed. (1)

(1) By s. 105 of the Metropolis Management Act, 1855: "In case the owners of the houses forming the greater part of any new street, laid out or made, or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry or district board of the parish or district in which such street is situate, be desirous of having the same paved, as hereinafter mentioned, or if such vestry or board deem it necessary or expedient that the same should be so paved, then and in either of such cases such vestry or board shall well and sufficiently pave the same .... and from time to time keep such pavement in good and sufficient repair; and the owners of the houses forming such street shall on demand pay to the vestry or board the amount of the estimated expenses of providing and laying such pavement, such amount to be determined by the surveyor for the time being of the vestry or board, &c."

By s. 250: "the word 'street' shall apply to and include any highway (except the carriage-way of any turnpike road), and any road, bridge (not being a county bridge), lane, footway, square, court, alley, passage, whether a thoroughfare or not, and a part of any such highway, road, bridge, lane, footway, square, court, alley, or passage."

By s. 112 of the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), which by s. 110 is to be construed together with the Act of 1855 as one Act, "the expression 'new street' shall apply to and include all streets hereafter to be formed or laid out, and a part of any such street, and also all streets, the maintenance of the paving and roadway whereof had not,

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Rigby, Q.C., and *R. T. Reid, Q.C.* (*G. M. Freeman*, with them), for the defendants. The road or street in question was not a "new street" within the meaning of the Metropolis Management Acts, and, therefore, the plaintiffs were not entitled to charge the expenses of paving it on the owners. This road was substituted under the Crystal Palace Acts for the old highway, which was shewn by the evidence to be repairable by the parish. By s. 250 of the Metropolis Management Act, 1855, the word "street" is to apply to and include any highway. Admitting that for the present purpose an old highway may in some cases become a new street by the erection of buildings on the side or sides of it, that is not so where, as here, a special Act of Parliament has already put the maintenance of it on the vestry. It is contended that, having regard to the definition of "new street" given by s. 112 of the Metropolis Management Amendment Act, 1862, and to the effect of the provisions of the Crystal Palace Acts, this was not a new street. The road was laid out and made, and the Crystal Palace already occupied the whole of one side of it, in 1855; and it was a street, the maintenance of the paving and roadway whereof had previously to the passing of the Metropolis Management Acts been taken into charge and assumed by the surveyor of highways in the parish. By s. 96 of the Metropolis Management Act, 1855, the vestry is made surveyor of highways, and all streets (being highways), and the pavements, stones, and materials thereof, are vested in them. It is immaterial that the vestry never in fact have repaired this road. The maintenance of it was by law put into their charge before 1856. By the Crystal Palace Acts the road is made a highway in substitution for the old highway, and it is obvious that the intention of the legislature was that all incidents attaching to the old road should attach to it. At common law, as soon as a way was dedicated as a highway and used by the inhabitants, it became repairable by

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previously to the passing of this Act, been taken into charge and assumed by the commissioners, trustees, surveyors, or other authorities having control of the pavements or highways in the parish or place in which such streets are situate, and a part of any such street, and also all streets partly formed or laid out"; and "the word 'pave' shall apply to and include the formation of the roadway or footway of any street."

the parish. The 23rd section of the Highways Act, 1835 (5 & 6 Wm. 4, c. 50), only applies where a person proposes to dedicate a road; it does not apply to a case in which an Act of Parliament declares a road dedicated. The maintenance of the pavement and roadway of this road was therefore by the Crystal Palace Acts put into the charge of the vestry before the passing of the Metropolis Management Acts. It was a macadamized road. Macadamization comes within the term "paving" for this purpose; by the 112th section the word "pave" includes the formation of the roadway of any street. See *Hampstead Vestry* v. *Hoopel.* (1) Assuming that an old highway may become a new street by becoming a street in the popular sense of the term, there is no evidence of any conversion of this road into a new street after January, 1856. It is contended, indeed, that, having regard to s. 112, in order to constitute it a new street, there must be evidence of such conversion after 1862. It is contended, first, that this is not a street in the popular sense even now; and, secondly, that, if it is, it was so before either 1856 or 1862. The Crystal Palace already occupied the whole of one side of it in 1855. There may be a street in the popular sense with continuous buildings on one side of it only. It is not shewn that the other buildings were not erected before 1862.

[FRY, L.J. Is not the question whether, apart from the definition in s. 112 of the Act of 1862, this was not a new street within the meaning of the Act of 1855, by which the power to pave was originally given to the vestry and the liability thrown on the owners?]

If that be so, the same arguments apply, for the Crystal Palace was erected before 1856.

[FRY, L.J. Sect. 105 of the Metropolis Management Act, 1855, speaks of new streets "laid out or made, or hereafter to be laid out or made."]

It is contended that the term "new street" must now be interpreted with reference only to the definition in s. 112 of the Act of 1862, for by s. 77 of that Act the incidence of the liability to pay for the paving was altered, and a liability was thrown on

(1) 15 Q. B. D. 652.

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owners of lands as well as those of houses abutting on the new street. [They cited also *Wilson* v. *Vestry of St. Giles, Camberwell.* (1)]

Sir E. Clarke, S.G., and *Macmorran*, for the plaintiffs. The evidence does not prove that the old highway, for which this road was substituted, was repairable by the parish. There are many highways which are not so repairable. There is nothing in the Crystal Palace Acts to impose a liability to repair the new highway on the parish, and the vestry have never in fact "taken into charge or assumed the maintenance of the pavement and roadway of such highway." The argument for the defendants would really involve that no old highway repairable by the parish could ever become a new street. The mere liability of the parish to make a highway passable does not amount to taking charge of the maintenance of the pavement and roadway within the 112th section. The definition in that section is not exhaustive, and a road may become a new street independently of the definition by becoming such in the popular sense of the word through the erection of buildings: *Pound* v. *Plumstead Board of Works* (2); *Robinson* v. *Local Board of Barton Eccles.* (3) The contention for the plaintiffs is that this road has so become a new street. The authorities shew that a "new street" may come into existence in three ways: first, where it is made de novo; secondly, where an old highway becomes a new street in the popular sense by houses or buildings being erected on the sides of it; and thirdly, where it is a highway, the maintenance of the pavement or roadway of which has not been taken into charge by the road authorities. It is contended that this road has become a new street in the second of these ways. The 105th section of the Act of 1855 contemplates new streets already laid out or made at the passing of the Act; and, assuming that this road had become such by the building of the Crystal Palace, it had only done so quite recently. But it is contended that it really became a new street subsequently by the building of the station and other buildings. A street which is once a new street

(1) [1892] 1 Q. B. 1. (2) Law Rep. 7 Q. B. 183.
(3) 8 App. Cas. 798.

within the Acts does not cease to be a new street until the vestry exercise their powers. [They also cited *Dryden* v. *Overseers of Putney*. (1)]

R. T. Reid, Q.C., in reply.

LORD ESHER, M.R. In this case the question is whether, when the vestry paved this road, it was a new street within the meaning of the Metropolis Management Act, 1855. If it was, they had a right to pave it and to charge these expenses on the defendants. If there had been no previously existing road, I should say that this road would clearly have been a new road, and the only question would have been whether it had become a new street. It was argued, however, in this case, that it must be treated as an old road because it was made under an Act of Parliament that gave power to divert a previously existing road, which was an ancient highway repairable by the parish, and provided that, when made, it should be dedicated to the public. Therefore, it was said that it must be treated as being substituted for the old highway. I agree that the effect of the Crystal Palace Acts is that the new road, when made, is to become immediately, without more, a highway dedicated to the public in substitution for the old highway, and therefore it must be treated as if it were the old highway. For certain purposes every highway is a street within the meaning of the Act, but not for all purposes. The real question is whether this highway is a "new street." In order to justify the plaintiffs in charging these expenses it must be a "new street." It was not a "new street" when it was first made. The question is whether it has not since become a new street, and, if so, when it became so. It was argued that it was an old street, having regard to the definition of "new street" given by s. 112 of the Act of 1862. I do not think that that argument is correct. In my opinion, all that section does is to invent certain new streets, to include certain things in the term "new street" which otherwise might not have been included in the term; but it does not exclude things which men would before have called new streets in the ordinary sense of the term. Therefore, I do not think that this

(1) 1 Ex. D. 223.

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case is to be determined by the definition in the Act of 1862. The question is whether this road has not become a street in the ordinary sense of the term, and, if so, whether it is a new street. If so, it comes within the Act of 1855. It was argued that it was not a new street because the Crystal Palace was already erected on one side of it. Would that alone make it a street in the ordinary sense of the term? That is a question of fact. Would any ordinary person have called it a street? I should think that, as a matter of fact, no one would call such a road as this a street merely because it had one such building on one side of it. To make a street, I think there must be a sufficient number of houses or buildings to constitute a street according to the ordinary sense of mankind. How many more than one there must be I will not undertake to say. If there were only two, half a mile from each other, I should say it would not suffice. The whole thing must be looked at: the number and character of the buildings and their position. In this case the present state of things is this: there is one large building which takes up substantially the whole of one side of the road; then, on the other side, there is afterwards built a railway station, not on the level of the road, no doubt, but the argument has convinced me that that fact is immaterial; so that building must be taken into account. Then there is on the same side the top of the tunnel, and there are four dwelling-houses. Having all these buildings bounding it, I come to the conclusion that this road had become a street in the ordinary sense when these buildings were erected alongside of it. The question is whether it is a new street. The language of the Metropolis Management Act, 1855, s. 105, involves that a street may be a new street although it was already made at the time of the passing of the Act, at any rate, if it was made at a time sufficiently near to the passing of the Act. This road, in my opinion, became a street either after the passing of the Act, or, at all events, very shortly before it. I think that the fact that a street is in existence at the time of the passing of the Act may be a matter to be taken into consideration in determining whether it is a new street. A street might have been made so long before the passing of the Act that it would be absurd to call it a new street. It appears to me, however, that, whenever this

street became a street, it was not so old at the passing of the Act that it might not be called a new street. Taking into consideration the time when these buildings were built, and the sort of buildings which they are, and their position in the street, I come to the conclusion that this is a case in which an old highway became a new street, and that, whenever this happened, the street was not so old that it would not be a new street within the meaning of s. 105. For these reasons I think that the plaintiffs were entitled to charge these expenses on the defendants; and therefore the decision of the learned judge was correct, and this appeal must be dismissed.

FRY, L.J. I am of the same opinion. The history of the road in question appears to have been this. There was originally an ancient country road, which was a highway with woods on one side, and, I suppose, fields on the other. A new road was made under the Crystal Palace Acts, and was both in fact and in law substituted for the original road. It is plain that the intention of the legislature was to put the new road in the same position legally and, as far as possible, physically, as the old highway. Then the following changes took place with regard to the road. The Crystal Palace occupied substantially all one side of it. Then, after 1856, a large portion of the other side was occupied by a railway station, which was on a lower level, no doubt, but the wall and roof of which were alongside of and above the road, and by an open cutting and the tunnel, and there were four dwelling-houses erected on that side of the road. The law which we have to apply is to be found in the 105th section of the Metropolis Management Act, 1855. The whole matter turns, in my opinion, on the construction of that section, which gives power to the local authority to pave in two cases: first, "in case the owners of the houses forming the greater part of any new street laid out or made, or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry or district board of the parish or district in which such street is situate, be desirous of having the same paved;" secondly, "if such vestry or board deem it necessary or expedient that the same should be so paved." Now, certain matters are clear. One is, that the term "new

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street" is applied by the section to streets which were laid out or made before the passing of the Act, as well as to those which may be laid out or made afterwards. Another matter which is clear is, that where the authority has caused a new street to be paved it ceases to be a new street. Subject to those considerations, we have to apply the language of the section according to its ordinary meaning in the English language. I am quite aware that there is contained in the Metropolis Management Amendment Act, 1862, s. 112, what has been spoken of as a definition of the term "new street." I do not think it is accurately spoken of as a definition. It does not attempt to define the meaning of "new street," but only says affirmatively that it shall include certain things. It leaves to the words the full scope of their natural meaning. For the purposes of this case, I think that this interpretation clause may be neglected. The question appears to me, therefore, to turn entirely on the Act of 1855, and on the question whether this was a new street within the meaning of that Act. I think that it was. Whether it had become so in 1856 I do not think it necessary to determine; but I will assume either way—either that it had, or that it had not. If it had, the vestry had power to cause it to be paved, and it remained a new street till they exercised the power. But suppose that it had not, then I think that it has become a new street since. Looking at its physical condition, occupied as it is on one side chiefly by the Crystal Palace, and on the other side by walls and palings as described, and looking at its general character, I think that it became at some date after 1856 a "new street" in the ordinary sense of the words. If that be so, there is an end of the case. I am very much confirmed in that conclusion by two cases: the first is *Pound* v. *Plumstead Board of Works.* (1) In that case Lord Blackburn (then Mr. Justice Blackburn) said: "The legislature, in s. 105, from the context shew that they are using the words 'new street' in the ordinary and natural sense of the words; and it does not follow because in the interpretation clause they say the expression 'new street' shall include certain other things, we are to say it does not include its own natural sense. When a highway, which was not a street in the popular sense of the word, but

(1) Law Rep. 7 Q. B. 183.

merely a country lane, became a street by the building of houses continuously on each side of it, it then became a new street within the meaning of the statute, and the board had a right to pave it, and charge the expenses upon the owners of the adjoining houses." I think that the words so used exactly apply to this case, except that the structures on the side of this road are not all houses, but mostly other buildings. The other case is *Robinson* v. *Local Board of Barton Eccles.* (1) Lord Selborne, L.C., said in that case: "I look upon this portion of the interpretation clause" (s. 4 of the Public Health Act, 1875) "as meaning neither more nor less than this, that the provisions contained in this Act as to streets, whether new streets or old streets, shall, unless there be something in the subject-matter and the context to the contrary, be read as applicable to these different things. It is perfectly consistent with that that they should be read as applicable, and should be applied, to those things to which they would in their natural sense apply, and which do not require any interpretation clause to bring them in; and in the natural and popular sense of the word 'street,' or the words 'new street,' I should certainly understand a roadway with buildings on each side (it is not necessary to say how far they must or may be continuous or discontinuous); and by 'new street,' a place which before had not that character, but which, by the construction of buildings on each side, or possibly on one side, has acquired it." Those observations of Lord Selborne, L.C., appear to me to apply to a road which, like this, has acquired the character of a "street" in the popular sense by the erection of buildings on each side of it.

LOPES, L.J. The language of the definition of "new street" in s. 112 of the Act of 1862 includes certain other things, but does not exclude what independently of such definition would be a "new street." I therefore think that this case must be dealt with under s. 105 of the Act of 1855 quite independently of s. 112 of the Act of 1862. I think it plain that in s. 105 the legislature were using the term "new street" in its ordinary popular and natural sense. The question is, therefore, whether

(1) 8 App. Cas. 798.

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LOPES, L.J.

this road is a new street in that sense. I regard the legislation contained in the Crystal Palace Acts as having placed the new road precisely in the same position legally as the old road for which it was substituted. Then, what is the state of things now with regard to the buildings on that road? It appears that there is now the Crystal Palace on one side, occupying very nearly the whole length of it; and on the other side there is the railway station at a lower level certainly, but still abutting on the road and approached from it and having its roof higher than the road; then there is a vacant space; then comes the tunnel and these four houses, all of the buildings on that side having been erected since 1855. I come to the conclusion that under the circumstances this road has become a new street within the meaning of s. 105. It was urged upon us that it became a new street by reason of the Crystal Palace being erected on one side of it. I cannot think myself that the erection of that one building by the side of a road, such as this then was, constituted it a street. For these reasons I think that this appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Irvine, Hodges, & Borrowman.*
Solicitors for defendants: *Marsden & Son.*

E. L.

C. A. 1892 *May* 21.

[IN THE COURT OF APPEAL.]

LONDON COUNTY COUNCIL, APPELLANTS; CHURCHWARDENS AND OVERSEERS OF THE PARISH OF WEST HAM AND ASSESSMENT COMMITTEE OF WEST HAM UNION, RESPONDENTS.

Poor-rate—Sewers, Non-rateability of—Beneficial Occupation—Hypothetical Tenant—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), s. 150.

The Metropolitan Board of Works, under powers given to them by statute, constructed certain sewers in the respondent parish for the purposes of the main drainage of the metropolis. The powers, liabilities, and property of the Board were, by the Local Government Act, 1888, s. 40, sub-s. 8, transferred to the appellants. The above-mentioned sewers having been rated to the poor-rate of the parish, in a case stated by quarter sessions upon appeal against the rate, it was found that, whilst used as part of the metropolitan sewage system, the sewers were incapable of yielding a profit and could not be worked except at a loss; but it was also found that, if they were, not in the posses-

sion of the appellants, but in the hands of a private owner and connected with the metropolitan sewage system to be let to the appellants, they would be willing to pay a yearly rent for the same, for the purpose of being used as part of the metropolitan sewage system, sufficient to support the rate:—

Held, upon the construction of the enactments relating to the Metropolitan Board of Works, that the appellants had no power legally to become tenants of such sewers; that they therefore could not be considered as possible tenants of them; that the sewers were not capable of a beneficial occupation; and that they were therefore not rateable.

Mayor, &c. of Burton-upon-Trent v. *Assessment Committee of Burton-upon-Trent* (24 Q. B. D. 197) distinguished.

Reg. v. *Metropolitan Board of Works* (Law Rep. 4 Q. B. 15) and *Metropolitan Board of Works* v. *West Ham* (Law Rep. 6 Q. B. 193) followed.

APPEAL from the judgment of the Queen's Bench Division upon a case stated by quarter sessions on an appeal against a poor-rate for the parish of West Ham in the West Ham Union.

The appellants were rated as occupiers of certain hereditaments described as pumping-station, land and premises, house, lodge, and cottages, at a sum of 6227*l.* as the gross estimated rental, and 4982*l.* as the rateable value, and as occupiers of certain other hereditaments, described as outfall mains, at a sum of 13,781*l.* as the gross estimated rental, and 11,026*l.* as the rateable value. The quarter sessions dismissed the appeal against the rate subject to the case.

The special case was as follows:—

"1. The London County Council (the appellants) are the governing body of the administrative county of London, and are, by virtue of the provisions of 51 & 52 Vict. c. 41, the successors to the Metropolitan Board of Works, and are the present owners of the outfall mains or sewers, pumping-station, and other premises, the subject-matter of this appeal. The appellants have to discharge all the duties of the Metropolitan Board of Works in reference to the drainage of the metropolis.

"2. Pursuant to powers and duties contained in the various Acts passed for the better government and drainage of the metropolis, and known as the Metropolis Management Acts, 1855, 1858, and 1862, the Metropolitan Board of Works designed and constructed a system of drainage for the metropolitan area. Under the said system sewers and the pumping-station in question, known as the Abbey Mills Pumping-station were

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constructed, by means of which the sewage is lifted from a lower to a higher level for the purpose of being conveyed by what is called the Northern Outfall Sewer to the Barking Outfall Works and then discharged into the river Thames.

"3. In order to enable the sewage from that part of the metropolitan area which is drained by the Northern Low Level Sewer to be raised to a higher level, for the purpose of being discharged into the river Thames, it was necessary to construct a pumping-station with the necessary machinery; and for this purpose the Metropolitan Board of Works purchased about seven and a half acres of land in the said parish, and constructed thereon the pumping-station in question, with all the necessary machinery and works. So much of the said outfall mains or sewers as are situate in the said parish are constructed in an embankment upon land purchased by the said Metropolitan Board of Works for such purpose and occupying in all about thirty-seven acres.

"4. The said sewers, machinery, works, and pumping-station were specially designed and constructed for the work which they have to do in connection with and for the purpose of the metropolitan main drainage system, of which they form an essential integral part.

"5. The said lands, sewers, pumping-station, and works were and are suitable and necessary to enable the appellants to discharge their statutable duties under the said Acts and to dispose of the sewage, and are held, occupied, and used by the appellants in the manner and solely for the purposes herein set forth.

"6. The said lands, sewers, pumping-station, and works, whilst used as part of the metropolitan sewage system, are incapable of yielding a profit, and cannot be worked except at a loss.

"7. By the provisions of 18 & 19 Vict. c. 120, s. 150, and 21 & 22 Vict. c. 104, s. 3, the Metropolitan Board of Works were, and the appellants are now, authorized to purchase and take on lease land for the purposes therein mentioned; and they are empowered by 18 & 19 Vict. c. 120, s. 154, to dispose by sale of the property so acquired. (1)

(1) By s. 135 of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), certain main sewers mentioned in Schedule D to that Act are

"8. It is agreed that, if the land, sewers, pumping-station, and works in question were, not in the possession of the appellants, but in the hands of a private owner, and connected with the metropolitan sewage system, to be let to the appellants as tenants, they would be willing to pay a yearly rent for the same for the purpose of being used as part of and in connection with the metropolitan sewage system, sufficient to support the gross and rateable values of the said hereditaments as determined by the quarter sessions as hereinbefore mentioned; and it was found as a fact by the said quarter sessions that, except for the purposes of the metropolitan sewage system, and if the said land, pumping-station, and works were disconnected therefrom, and in the hands of a tenant applied to any other use or purpose for which they might be available, the gross estimated rental of the said land, pumping-station, and works (exclusive of sewers) was 3125*l.*, and the rateable value 2500*l.*

"9. The appellants contend that the said sewers and embankment ought not to be included in the rating, on the ground that they are not capable of a beneficial occupation; and in support of this contention they rely, among other things, upon the provisions of s. 45 of the West Ham Corporation (Improvements) Act, 1888 (51 & 52 Vict. c. clxxix.); and further, they contend that so much of this property as is liable to be rated to the relief of the poor should be rated at the value for which the same would let to a hypothetical tenant from year to year, supposing that it was not used for the purpose of the metropolitan sewage system, but was entirely disconnected therefrom and applied to any other use or purpose for which it could be

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vested in the Metropolitan Board of Works, and it is provided that, "such board shall make such sewers and works as they may think necessary for preventing all or any part of the sewage within the metropolis from flowing or passing into the river Thames in or near the metropolis .... and shall also make all such other sewers and works .... as they may from time to time think necessary for the effectual sewerage and drainage of the metropolis .... and such board shall from time to time repair and maintain the sewers so vested in them, &c." By s. 150, the Metropolitan Board of Works may "purchase or take on lease for such term as they may think fit, any land, or any right or easement in or over any land which they may deem necessary or expedient for the formation or protection of any works which they are authorized to execute under this Act."

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made available by a tenant thereof, according to the rule laid down in *Metropolitan Board of Works* v. *West Ham.* (1)

"10. The respondents contend that it is not necessary to rateability that the premises, as actually occupied and utilized, should yield or be capable of yielding a commercial profit; but that it is sufficient if they could be let and would command a rent from any possible hypothetical tenant from year to year; that the appellants ought to be taken into account as one of the possible hypothetical tenants from year to year; and that the rule as laid down in *Mayor, &c. of Burton-upon-Trent* v. *Assessment Committee of Burton-upon-Trent Union* (2) governs this case, and that the present rate is right."

The Divisional Court (Lawrance and Wright, JJ.) gave judgment on the case for the respondents, on the ground that the case was governed by the decision in *Mayor, &c. of Burton-upon-Trent* v. *Assessment Committee of Burton-upon-Trent Union.* (2)

Avory, for the appellants. It is not proposed to argue the question with regard to the pumping-station, works, and premises other than the sewers. It would be difficult to do so in this Court after the decision in *Mayor, &c. of Burton-upon-Trent* v. *Assessment Committee of Burton-upon-Trent Union.* (2) But it is contended that the sewers themselves are not rateable. It was held in *Reg.* v. *Metropolitan Board of Works* (3) and *Metropolitan Board of Works* v. *West Ham* (1) that such sewers were not rateable. The London County Council were under a statutory obligation to take over these sewers from the Metropolitan Board of Works; and it is clear from par. 6 of the case that, having regard to the statutory conditions under which the council hold them, they are not capable of any profitable occupation. The admission contained in par. 8 of the case is merely to the effect that, if the London County Council are to be considered as possible tenants of the sewers, they would be willing to give a rent which would be sufficient to support the assessment. It is obvious, having regard to par. 6, that par. 8 does not mean that

(1) Law Rep. 6 Q. B. 193. (2) 24 Q. B. D. 197.
(3) Law Rep. 4 Q. B. 15.

there is a beneficial occupation to that amount. The premises being incapable of beneficial occupation, they cannot be rateable. It is contended for the respondents that the London County Council may be considered as possible tenants on the principle laid down in *Reg.* v. *School Board for London* (1) and *Mayor, &c. of Burton-upon-Trent* v. *Assessment Committee of Burton-upon-Trent Union.* (2) But the county council cannot be considered as possible tenants, because they have no power to rent sewers. The only power given to them by s. 150 of the Metropolis Management Act, 1855, is to purchase or take on lease for such term as they may think fit any land which they may deem necessary or expedient for the formation or protection of any works which they are authorized to execute. They are not empowered to rent sewers already made by some one else; and, even if they could rent sewers, the cases of *Reg.* v. *School Board for London* (1) and *Mayor, &c. of Burton-upon-Trent* v. *Assessment Committee of Burton-upon-Trent Union* (2) are distinguishable, because the subject-matter of the rate in those cases was in its nature capable of profitable occupation. In the former case, the subject-matter of the rate was houses which were capable of profitable occupation; in the latter, it was a sewage farm and pumping-station, which are in themselves capable of profitable occupation, though they were in fact worked at a loss in that case. In the present case the sewers are incapable of beneficial occupation, and, therefore, on general principles, are not rateable. [He also cited *Hare* v. *Overseers of Putney* (3); *Mersey Docks and Harbour Board* v. *Overseers of Llaneilian* (4); *Mersey Docks* v. *Jones* (5); *Greig* v. *University of Edinburgh.* (6)]

R. T. Reid, Q.C., and *John Montefiore*, for the respondents, the churchwardens and overseers. It is submitted that the London County Council are empowered to rent sewers, and therefore the case is within the principle laid down in *Reg.* v. *School Board for London* (1) and *Mayor, &c. of Burton-upon-Trent* v. *Assessment Committee of Burton-upon-Trent Union.* (2) The Metropolitan Board of Works could take land and make a sewer upon it;

(1) 17 Q. B. D. 738.
(2) 24 Q. B. D. 197.
(3) 7 Q. B. D. 223.
(4) 14 Q. B. D. 770.
(5) 11 H. L. C. 443.
(6) Law Rep. 1 H. L., Sc. 348.

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and it is submitted that they could also take land with a ready-made sewer upon it. The power of purchasing and that of leasing stand exactly on the same footing according to the language of the Act. An existing sewer comes within the term "land." Could it be contended that, if there were a certain length of sewer already in existence entirely suitable for forming part of a system of sewerage which the board were about to construct, they could not purchase that length of sewer, or, if they took the land on which it was, they must destroy it and make another? Whatever they could purchase under s. 150 they could take on lease. The contention for the appellants leads to the strange result that the board might purchase or take the land on lease if they intended to pull down the existing sewer and make a new one, but might not purchase it or take it on lease if they intended to utilize the existing sewer. If the county council could be tenant of the sewers, then the admission in par. 8 of the case is conclusive as to the value of their occupation. The case of *Mayor, &c. of Burton-upon-Trent* v. *Assessment Committee of Burton-upon-Trent Union* (1) shews clearly that if the council could rent sewers, there is a beneficial occupation which is rateable.

[LORD ESHER, M.R. That was the case of a sewage farm and the necessary machinery for such a farm, a subject-matter which appears to be capable of profitable occupation. That is different from the case of a sewer.]

Gwynne James, for the assessment committee.

Avory, did not reply.

LORD ESHER, M.R. In this case the only subject-matter on which we are called upon to decide is the question whether the county council are rateable in respect of the sewers. For the purposes of the argument before us, the question whether they are rateable in respect of the other works was withdrawn; and therefore the decision of the sessions as to those other works will not be interfered with. Now, the London County Council are a body created by Act of Parliament with certain powers and

(1) 24 Q. B. D. 197.

liabilities; and, being so created, the only powers which they can have are those which expressly or by necessary implication are given to them by Act of Parliament, and the only liabilities which they can have are those imposed upon them by Act of Parliament either expressly or by necessary implication. They have, among other things, the power of making sewers; and, when they are made, they have with regard to them a power and a liability. The liability is to use them, and to keep them in such a condition that they shall be capable of being used for the purpose for which they were constructed, viz., conveying the sewage. The power is to cause a rate to be made to pay for the expenses of the sewers. I think it is obvious that that power is thus limited: they can only charge whomsoever they may be entitled to charge such amount as will enable them to do their duty in respect of maintaining and using the sewers, and no more. That being so, have they power to become tenants of such sewers? That depends on the Act of Parliament. The Act enables them to form sewers and to keep them in proper condition, and it enables them to purchase land for the purpose of forming or protecting any works which they are authorized to execute under the Act. It also gives them power to take land on lease for the purpose of forming or protecting any such works. It gives no express power of taking sewers or other works on lease. The respondents' counsel argued that it did give such power expressly, because it gave them power to take land on lease, and "land" includes sewers; but, even if that be so, it gives only a limited power to take land on lease; the power is to take land on lease for the purpose of forming or protecting sewers and other works, and not for the purpose of acquiring ready-made sewers or works. Then, is it a necessary implication that, because they have power to form sewers and to take land on lease for that purpose, they are to have power to take sewers on lease on such terms as a landlord might impose in the lease with regard to the use and control of the sewers? So far from that being a necessary implication, I think that, when one considers what their duty is as to the vast metropolitan area with which they have to deal, one would expect that they would not be allowed to take anything less than absolute control over the

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Lord Esher, M.R.

sewers—that they are intended to make the sewers themselves and to have sole control over them. Nice questions were raised as to whether they could buy land with a sewer ready made upon it, which it is unnecessary to determine. I am of opinion that they have no power to take sewers made by other people on lease. It was said that this case is governed by the case of *Mayor, &c. of Burton-upon-Trent* v. *Assessment Committee of Burton-upon-Trent Union.* (1) That case decides that, in considering who may be hypothetical tenants of premises, not only people other than the actual occupiers are to be considered, but also you must consider the actual occupiers and see whether they might not be hypothetical tenants. That is, in my opinion, all that the case decides. Therefore, if the county council could be tenants, and such tenants as are contemplated by the Parochial Assessment Act, then that case would be applicable. It seems to me that in the present case no person other than the county council could be considered as a possible tenant of these sewers. For any other such tenant would take them subject to the restriction imposed by the Act of Parliament, viz., that no charge could be made for the use of them beyond what would be exactly sufficient to maintain them. That being so, according to many cases, which have decided what after all is matter of common sense, no person could be assumed to be a possible tenant who could not possibly make anything by being a tenant. Therefore in this case there is no possible hypothetical tenant except the county council. Then, can they be such tenants? I think not, first, because, as I have said, they have no power to become tenants of the premises at all; and secondly, because I do not think they are the sort of hypothetical tenant which is necessary; they would be subject to the restrictions of the Act, and could make nothing by such tenancy. I do not think that in the case of *Mayor, &c. of Burton-upon-Trent* v. *Assessment Committee of Burton-upon-Trent Union* (1) the Court intended to overrule the earlier cases on the subject; and I do not think that that case governs the present for the reasons which I have already given. On these grounds I think that this appeal must be allowed, so far as the sewers are concerned.

(1) 24 Q. B. D. 197.

FRY, L.J. I am of the same opinion. It appears to me that, under the statutes relating to the poor-rate, three questions have to be considered: 1st, whether there is an occupier; 2ndly, whether there is a reasonable expectation of letting from year to year to a tenant; 3rdly, whether there is a reasonable expectation of letting at a rent of the kind described in the Parochial Assessment Act. Where there are these three things, there is rateable property. That, I think, is the effect of the view which was very clearly expressed by the Master of the Rolls in *Reg.* v. *School Board for London.* (1) He there said: "The real question is how the value is to be ascertained. The inquiry is not as to what rent is paid by the actual occupier. The mode of finding out the value is laid down in the Act, and it is to ascertain the rent which *a* tenant (not *the* tenant), taking one year with another, might reasonably be expected to pay; it is also implied that, where the owner occupies, he is to be considered as if he were a tenant. The directions given by the Act are equivalent to saying that one must look at all possible tenants, and the phraseology does not exclude an owner who himself occupies the premises. Therefore, an owner in occupation of the premises is not excluded from consideration as a possible tenant. Now, the school board can be tenant of premises. If by the terms of any statute it could not legally be tenant, it would be excluded from the calculation." As I agreed with that judgment when it was delivered, so I agree with it now. It appears to me to express the true principle upon which we must proceed. We have to inquire, therefore, whether the county council can be tenants of these sewers. If they can be supposed to be so, then they come within the scope of the expression "hypothetical tenant," as used in the cases. If they cannot, there can be no suggestion of any hypothetical tenant. In my opinion, they cannot be supposed to be tenants for this reason. The only power they have is to purchase and take on lease any land which they may deem necessary for the formation or protection of any works. Among the works which they are entitled to construct are these very sewers. So, though they are authorized to take land on lease for the purpose of making sewers, they are not authorized to take on lease ready-

(1) 17 Q. B. D. 738.

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made sewers. I do not think that to be an over-fine distinction. The object of the legislature appears to me to have been to constitute a responsible body to undertake the duty of forming a drainage system for the metropolis. It was not intended, I think, that they should take leases of old sewers. They were to form and maintain a new system of sewerage. Therefore, it seems to me that they could not be considered as possible tenants of these sewers. A very ingenious argument was put forward for the respondents. It was said that a sewer was land, and the county council may take land on lease, and, therefore, they could take a sewer on lease; they might take the old sewer, and form on the site of it a new one. But there is no finding that the county council would be prepared to rent the land for such a purpose as that. The statement in the case in substance is that, if they could take the present sewers for use as such, they would be willing to give the yearly rent mentioned. There is no suggestion that they would take them for the purpose of making fresh sewers. For these reasons, I think that these sewers are not hereditaments of which the county council could be possible tenants. Therefore, the contingency pointed out by the Master of the Rolls, viz., where the owner in occupation could not legally be a tenant of the premises, has occurred; and in this respect the case differs from those of *Mayor, &c. of Burton-upon-Trent* v. *Assessment Committee of Burton-upon-Trent Union* (1) and *Reg.* v. *School Board for London.* (2)

LOPES, L.J. The question as to the pumping-station and works other than the sewers was not argued before us. The counsel for the appellants thought that the case was governed, so far as they were concerned, by *Mayor, &c. of Burton-upon-Trent* v. *Assessment Committee of Burton-upon-Trent Union.* (1) The question as to the sewers alone was argued. The sewers could only be rateable, as it seems to me, if the county council could be considered as possible tenants of them, which would bring the case within the authority of the *Burton Case.* (1) I do not think that they can be so considered, on the ground that, though the Act of Parliament authorizes them to buy or lease

(1) 24 Q. B. D. 197. (2) 17 Q. B. D. 738.

land for the formation of works, it does not authorize them to become tenants of ready-made works. Without going through the provisions of the Acts, it appears to me that, having regard to the scope of them, it was obviously not the intention of the legislature that the county council should lease works ready made. That being so, they cannot be considered as possible tenants of the sewers. That disposes of the case. I desire to say a word or two as to the other point which arises. But for the case of *Reg.* v. *School Board for London* (1), I should have thought that a body of persons who occupy under such statutory restrictions as those by which the appellants are affected, who are bound to occupy, and must suffer loss by such occupation, could not be the kind of hypothetical tenant contemplated by the Act of Parliament. I think what was contemplated was a tenant of the ordinary description, not a person who was bound to become a tenant at a loss. I do not myself think that this Court intended in the *Burton Case* (2) to overrule the earlier authorities, such as *Reg.* v. *Metropolitan Board of Works.* (3) Lush, J., there said: "As regards the sewers, we are of opinion that they are not rateable on the short ground that they are not at present the subject of a beneficial occupation. No payment is made to the board for the use of them; the rates which they are empowered to levy are for the expense of construction and maintenance, and nothing more. Their occupation yields no profit to the board, as occupiers, either actual or potential." For these reasons, as to the sewers, I think that this appeal should be allowed.

Appeal allowed.

Solicitors for the county council: *W. A. Blaxland.*

Solicitors for the churchwardens and overseers of West Ham: *A. A. Banes.*

Solicitors for the assessment committee of the West Ham Union: *Hillearys.*

(1) 17 Q. B. D. 738. (2) 24 Q. B. D. 197.
(3) Law Rep. 4 Q. B. 15.

E. L.

C. A.
1892
May 12.

[IN THE COURT OF APPEAL.]

SEARLES *v.* SCARLETT.

Defamation—Libel—Privilege—Register of County Court Judgments, Extract from—Trade Protection Society.

The publication of a mere copy of what is contained in a register of judgments, kept in pursuance of an Act of Parliament, and which by law the public are entitled to inspect, is privileged.

An extract from the register of county court judgments was published in a trade protection society's journal, stating that judgments had been obtained in the county court against the persons named, among whom was the plaintiff. A note was appended to the effect that the statement was taken from the register of county court judgments, but that no distinction was made in the register between actions for debt or damages or properly disputed cases, neither was it known which of the judgments remained unpaid, but it was probable that a large proportion of them had been settled or paid. The plaintiff brought an action for libel alleging by way of innuendo that the statement meant that a judgment had been obtained against him in the county court, which remained unsatisfied, and that he was insolvent and a person to whom credit ought not to be given:—

Held, that, having regard to the note appended, the statement complained of was incapable of the meaning alleged by the innuendo, and that such statement being merely an extract from the register of county court judgments, a document which by law was open to public inspection, the publication was privileged, and in the absence of evidence of malice the action could not be maintained.

Williams v. *Smith* (22 Q. B. D. 134) discussed.

Application for new trial of an action tried before Day, J., with a jury.

The action was for libel. The plaintiff was an hotel-keeper at Broadstairs, and the defendant was the secretary of the Ramsgate Trade Protection Association. The alleged libel was published on August 6, 1891, in *The Weekly Journal of the Associated Trade Protection Societies of Great Britain and Ireland*, issued by the Ramsgate and District Trade Protection Association. It was as follows: "Extracts from the Register of County Court Judgments: Kent; Defendant: Searles, Walter; Balmoral Hotel, Broadstairs; amount 23*l.* 2*s.* 3*d.*; Date 1891, July 11."

It was alleged in the statement of claim by way of innuendo that the meaning was that the plaintiff was insolvent, and that there was an unsatisfied judgment against him in a county court

for 23*l.* 2*s.* 3*d.*, and that no credit should be given to the plaintiff. The judgment was in fact satisfied at the time of the publication of the alleged libel. (1) The journal in question had a considerable circulation among tradesmen in the neighbourhood of Ramsgate. It contained lists of names and particulars headed respectively, "Extracts from the Register of Bills of Sale," "Bankruptcy Proceedings and Administration Orders," and "Extracts from the Register of County Court Judgments," in the last of which the plaintiff's name appeared. There was a note at the head of this list as follows: "We have received the following returns from the Registry of County Court Judgments, Treasury, Whitehall, up to Saturday last, which purport to contain lists of judgments entered up in the respective county courts of England and Wales; but no distinction is made in the register between actions for debt or damages or properly disputed cases, neither is it known which of the judgments remain unpaid at the present time, and it is probable that a large proportion of them have been settled between the parties or paid. It may also be observed that some of the judgments registered are against defendants in a representative capacity." The learned judge non-suited the plaintiff on the ground that the words complained of were not capable of the defamatory meaning alleged.

Watt, for the plaintiff. There was evidence of a libel for the jury. Having regard to the title and purposes of this journal, and to the other lists given, viz., of bankruptcies and bills of sale, it was open to the jury to find that the suggestion implied in the statement complained of was that the plaintiff was not a person to whom credit ought to be given. In *Williams* v. *Smith* (2), it was held in a similar case that the matter was rightly left to the jury.

H. F. Dickens, Q.C., and *Boydell Houghton*, for the defendant. The publication was privileged, and there is no evidence of actual malice. By the County Courts Act, 1888 (51 & 52 Vict c. 43), s. 183, a register of county court judgments is to be kept,

(1) It appeared to have been through some mistake that the judgment was ever entered on the register, as the plaintiff paid the amount of it on July 17.

(2) 22 Q. B. D. 134.

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which is to be open to inspection by the public. That being so, the case is within the decision of the House of Lords in *Fleming* v. *Newton* (1), where it was laid down that the publication of extracts from a public document, which any one was entitled to inspect, was privileged. That case was followed by the Court of Appeal in Ireland in *Annaly* v. *Trade Auxiliary Co.* (2) In *Williams* v. *Smith* (3) the principle so laid down was not questioned, but the case was decided on the ground that to publish the fact of the judgment having been obtained in a publication having the character of a black list without any explanation or qualification might amount to a suggestion that the judgment was still unsatisfied. It is impossible to put that construction on the statement published in this case, because it is accompanied by a note expressly negativing that suggestion. *Williams* v. *Smith* (3) is inconsistent with *Fleming* v. *Newton*. (1) [They also cited *M'Nally* v. *Oldham* (4); *Cosgrave* v. *Trade Auxiliary Co.* (5)]

Watts, in reply. The note inserted is not really an antidote to the suggestion implied in the publication in a trade protection journal of the plaintiff's name as a person against whom a judgment has been obtained. The reader would at once come to the conclusion that it was merely inserted by the publisher for his own protection.

LORD ESHER, M.R. I am of opinion that this application should be dismissed on the ground, not that the statement complained of was not a libel, but that, assuming it to be a libel if not published on a privileged occasion, it was published on such an occasion, and there was no evidence of actual malice. The statement complained of is contained in a publication called *The Weekly Journal of the Associated Trade Protection Societies of Great Britain and Ireland*, which is published for the protection of trade, and which gives a list of certain matters that have happened to tradesmen. The first of such matters consists of an extract from the register of bills of sale, shewing the persons who have given bills of sale. Then there is a list of persons in whose

(1) 1 H. L. C. 363.
(2) 26 L. R. Ir. 11, 394.
(3) 22 Q. B. D. 134.
(4) 16 Ir. C. L. R. 298.
(5) Ir. R. 8 C. L. 349.

cases proceedings in bankruptcy have been taken or orders for administration made. The only possible meaning of publishing these matters in a journal for the protection of tradesmen is to give notice to them of facts which they ought to consider before dealing with such persons. Then comes the extract from the register of county court judgments, containing the names of persons against whom such judgments have been entered. That obviously must be published for the same purpose, viz., that of laying before tradesmen information in order that they may consider whether they will give credit to such persons. It is in the nature of a black list, or warning list. There is, however, appended a note to the effect that, though these judgments have been entered, no distinction is made on the register between actions of debt or damages or properly disputed cases; and that it is not known which of the judgments remain unsatisfied, and it is probable that a large proportion of them have been settled between the parties or paid; and that it is also to be observed that some of the judgments registered are against defendants in a representative capacity. Where it is stated of a tradesman that a judgment has been entered against him in the county court, with the meaning that it is matter for consideration under those circumstances whether he is a person who ought to be dealt with, I think it may be the case that, if the occasion is not privileged, a jury might come to the conclusion that such a statement, being detrimental to the tradesman and calculated to injure him in his business, is libellous; but then comes the question of privilege. If such a list of judgments had not been made under any legislative authority, but had been kept by a private person for his own purposes, then it seems to me that there might be no privilege. But the ground upon which the privilege has been put is this. It has been said that these judgments are the judgments of a court of law instituted by the legislature, and it is directed by the law that a register shall be kept of them, which is to be open to public inspection. The legislature has enacted that people may go and look at the register, obviously not for the purpose of mere curiosity, but that they may act on the information thereby obtained; so that any tradesman who is considering whether he shall give credit

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to a person may inspect the register and see whether there are judgments against him upon it. The law provides that the register shall be a public document which anybody may consult for this purpose. That being so, the publisher of such a list as this is only doing for the public what they may do for themselves, and is only giving that information to the public and to tradesmen which the legislature has thought it right they should have. Therefore it is said that the publication of such a list is privileged and an action will not lie for it, unless the privilege has been abused. If the publication has been from an indirect motive, e.g., for the purpose of extorting money, or if there were any actual malice, e.g., if the publication were to gratify a feeling of revenge, then, no doubt, the privilege would be rebutted; but as long as the publication is bonâ fide and without actual malice, it is privileged. Of course, if a libel, however malicious, is true, it is not actionable. The doctrine of privilege assumes that there is a libel and that it is not true. There is clear authority, in my opinion, on the subject. To my mind, this case is governed by *Fleming* v. *Newton*. (1) In order that it may be so governed, I do not think it is necessary that the two cases should be exactly the same in their circumstances. I think that in that case the House of Lords laid down as the very foundation of their judgment a principle which will govern this case. That principle was enunciated by Lord Cottenham, L.C., not, it is true, in an action of libel, but, I think, as a principle which must govern a case of libel. It is, that where there is a register kept by virtue of an Act of Parliament for the purpose of giving information to the public, then, if a person makes a copy of it and publishes it, although he does so for the purpose of warning the public or tradesmen about to give credit, yet, if all that he does is to publish a copy of the register which is intended to be a public document, it is a privileged publication. He said: "From these references it appears to me clear that the legislature has thought that the public at large ought to be able to have recourse to this register, and of all the public the appellants have the highest interests in the knowledge of its contents. They are engaged in mercantile affairs in which their

(1) 1 H. L. C. 363.

security and success must greatly depend upon a knowledge of the pecuniary transactions and credit of others. That each of them might go or send to the office and search the register, is not disputed, and that they might communicate to each other what they had found there is equally certain. What they have done is only doing this by a common agent, and giving the information by means of printing. No doubt, if the matter be a libel, this is a publication of it; but the transaction disproves any malice, and shews a legitimate object for the act done." I think that what he so said was intended to apply even if the action were one for libel. That case has since been treated by every judge who has had to deal with such cases as this as laying down the governing rule in the matter. There is for instance the decision in *Annaly* v. *Trade Auxiliary Co.* (1) in the Irish Court of Appeal, which is not binding on us no doubt, but which is entitled to the highest respect. That was an action of libel in respect of a publication in *Stubbs's Weekly Gazette.* It came, in the first instance, before the Irish Court of Exchequer when Palles, C.B., was presiding. He said that the case was governed by the principle laid down by Lord Cottenham in *Fleming* v. *Newton* (2), with which he entirely agreed. The case then went before the Court of Appeal in Ireland. The first judgment was given by Lord Ashbourne, C. He took the reasoning in *Fleming* v. *Newton* (2) and applied it to the case before the Court. He said that there was a public officer bound to register all judgments lawfully brought to him in books open to the public, and intended essentially to be public, and that, when the judgment was registered, all the particulars copied into the register were published for all purposes and became public property; and that being so, when a society or person merely published what was contained in the register, for the purpose of giving information to tradesmen, which by law the public were entitled to, the publication was privileged and no action lay, not because the matter might not be libellous, but because it was privileged. Then O'Brien, C.J., and Fitzgibbon, L.J., gave judgment distinctly on the same grounds. Barry, L.J., said that he had doubted; but when a judge doubts and yields, it is often stronger than if he

(1) 26 L. R. Ir. 11, 394. (2) 1 H. L. C. 363.

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had never doubted. He said that, having regard to the decisions in *Fleming* v. *Newton* (1) and *Cosgrave* v. *Trade Auxiliary Co.* (2), he was not prepared to press his doubts to the extent of dissenting. Therefore, the result of that case is that, although the publication is in the nature of a black list, and intended to warn tradesmen, yet, if all that is done is to publish a copy of the register which is a public document, it is privileged. Then, was that doctrine infringed upon by the decision in *Williams* v. *Smith* (3)? I find some difficulty in dealing with that case. I do not think that there was any decision on this point by the Lord Chief Justice. I find no intimation of his opinion on any such point; he does not appear to have ruled whether there was any privilege or not; but what he said at the trial was that there was evidence on which the jury might find that the publication was libellous. In that case there does not appear to have been any such note, as there is in this publication, warning readers that the judgment may have been satisfied; and it seems to have been thought that, in the absence of any such note of warning, the jury might say that to publish such a list of judgments as this, accompanied with other lists relating to bankruptcies and bills of sale, implied a defamatory allegation that the judgment was unsatisfied. If that be the meaning of the case, it came to this, viz., that the defendants had not merely published a copy of the register; they had published a copy of the register and had added something else, for the register does not say whether the judgment is satisfied or not; they had said not only that the judgment had been entered but that it had not been satisfied. It is not necessary for me to say whether the other matters published did afford evidence of a defamatory addition to the register, or whether, in my opinion, that decision was or was not virtually in opposition to the reasoning of Lord Cottenham in *Fleming* v. *Newton* (1), though I am inclined to think that it was. Here it would be utterly unreasonable to say that the meaning was that the judgment was unsatisfied, seeing that there is a note which clearly says that people are not to take it that it remains unsatisfied. It is, therefore, not necessary to

(1) 1 H. L. C. 363. (2) Ir. R. 8 C. L. 349.
(3) 22 Q. B. D. 134.

discuss the case of *Williams* v. *Smith* (1) any further. Then there is the Irish case of *M'Nally* v. *Oldham* (2), which was decided on demurrer. Several of the judges who have subsequently referred to that decision appear to have doubted it, and one appears to have said that he did not agree with it. I should be disposed to say the same if it were necessary to do so. I think that this case is distinctly within the doctrine laid down by Lord Cottenham in *Fleming* v. *Newton* (3), more distinctly than the case of *Annaly* v. *Trade Auxiliary Co.* (4) in the Irish Court of Appeal; and, therefore, I have no hesitation in holding that the publication was privileged, and, as there was no evidence of actual malice, the action was not maintainable.

LINDLEY, L.J. I am of the same opinion. In this case we start with certain matters which are not in dispute. First, it is admitted that the extract published was an accurate copy of the register of county court judgments. Then we know that it is provided by law that such judgments shall be registered, and that the register shall be open to inspection by the public. Under these circumstances, it appears to me that the case of *Fleming* v. *Newton* (3) shews that this publication is privileged. It is the mere publication of what appears in a document which is open to the inspection of the public. That being so, in order to maintain the action, it is necessary to give some evidence of express malice. Having regard to the existence of the note to the effect that, although the extract is an accurate copy of the register, readers must bear in mind that the judgment may have been satisfied, I think that there was no evidence of express malice. The existence of that note distinguishes this case from *Williams* v. *Smith* (1), the propriety of which need not therefore be considered.

KAY, L.J. I agree with the conclusion at which the Master of the Rolls and my brother Lindley, L.J., have arrived, on the ground that in this case there is no untrue addition to the statement in the county court register, of which the extract published professes to be a copy. If there had been, in express

(1) 22 Q. B. D. 134.
(2) 16 Ir. C. L. R. 298.
(3) 1 H. L. C. 363.
(4) 26 L. R. Ir. 394.

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terms or by necessary construction of the document, a statement that the judgment remained unsatisfied at the date of the publication, I should think it would be impossible to say that there was any privilege in respect of that additional statement. If such a statement had been made and it were untrue, it would have been defamatory, and I do not see how the defendant could escape the consequences of having made it. But looking at the statement complained of, I see nothing but a copy of the register, which is perfectly accurate in all respects, and appended there is a note which states in effect that it is not known whether the judgment is satisfied, but it may be satisfied. I do not see how it is possible to read this document with that statement as meaning that the judgment was unsatisfied at the date of publication, which is the libel alleged. It is alleged in the statement of claim that the meaning of what was published is that the judgment was unsatisfied at the date of publication. It seems to me impossible to read it in that sense; nor is there any other addition to the statement in the register which could be treated as defamatory of the plaintiff. Therefore, the decision in the case of *Fleming* v. *Newton* (1) governs this case; for it is the case of a mere reproduction of statements in a public document to which the public have access without evidence of malice, and there is no addition which can be treated as defamatory. As at present advised, I should hesitate to say that the case of *Williams* v. *Smith* (2) could not be supported as being consistent with the decision of the House of Lords in *Fleming* v. *Newton* (1), on the ground that there was by implication a defamatory addition to the statement which would have been privileged if made alone, viz., that the judgment was unsatisfied.

Application dismissed.

Solicitor for plaintiff: *H. A. Swepstone.*

Solicitors for defendants: *Kingsford, Dorman & Co., for Burrows, Ramsgate.*

(1) 1 H. L. C. 363. (2) 22 Q. B. D. 134.

E. L.

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May 5, 6.

Poor Law—Settlement—Residence apart from Parent while under Sixteen—Irremoveability—Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 *Vict. c.* 61), *s.* 34.

A pauper had resided from the age of fourteen to the age of eighteen in a parish in the appellant union. Her father was dead, and her widowed mother resided outside the appellant union :—

Held, that the time during which the pauper was under sixteen ought to be reckoned in determining whether she had resided in the parish for the term of three years, under such circumstances in each of such years as would render her irremoveable, and, therefore, she had acquired a settlement in the parish under s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876.

SPECIAL CASE stated on appeal against an order of a metropolitan police magistrate, adjudging that the parish of Low Leyton, in the West Ham Union, was the place of the last legal settlement of Caroline Batchelliar.

The grounds of the order of removal were "that prior and after the pauper attained the age of sixteen (viz., from the age of fourteen to eighteen) she resided for three years and upwards at Thornhill Road, in the parish of Low Leyton, under such circumstances, in each of such years, as to render her irremoveable therefrom, and thereby acquired a settlement in the said parish."

The pauper, Caroline Batchelliar, was the lawful child of James and Caroline Batchelliar, and was born on July 27, 1865. Her father died when she was two years old. Her widowed mother was still living, and had resided for six years and upwards in Shoreditch, and was settled in Shoreditch parish.

When the pauper was about thirteen she commenced to go out to domestic service. A few days before July 27, 1879, she went to service at Low Leyton, where she remained until a few days before July 27, 1883. She then resided with her widowed mother upwards of two years at places outside the appellant union, and remained there until the end of 1887 or beginning of 1888. After that she resided (mostly with her

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mother) entirely at places outside the appellant union, until she became chargeable to the respondent parish.

The pauper, a few days before she attained the age of fourteen, went into domestic service in the parish of Low Leyton, in the appellant union, and resided there without interruption until a few days before she became eighteen years of age, when she went to reside with her widowed mother, as above stated, at places outside the appellant union.

The widowed mother of the pauper never at any time resided in the appellant union, and never had a status of irremoveability or a settlement in the appellant union.

The Court of quarter sessions dismissed the appeal.

The question for the opinion of the Court was:—

Whether the parish of Low Leyton, in the appellant union, was the place of the last legal settlement of the pauper. (1)

Jelf, Q.C. (*R. D. Muir*, with him), for the appellants. The magistrates were wrong in holding that the pauper had acquired a settlement in the appellant union, and therefore the order of removal ought not to have been made. The pauper, while under the age of sixteen, and having a parent living, could not acquire for herself a status of irremoveability apart from that parent so as to acquire a settlement under 39 & 40 Vict. c. 61, s. 34. This is the true effect of the proviso in 11 & 12 Vict. c. 111. The law on this subject is now settled by the decisions of the House of Lords in *Guardians of Reigate Union* v. *Guardians of Croydon*

(1) 11 & 12 Vict. c. 111, recites 9 & 10 Vict. c. 66, s. 1, repeals the proviso at the end of the section, and substitutes the following: "Provided always, that whenever any person should have a wife or children having no other settlement than his or her own, such wife and children should be removeable from any parish or place from which he or she would be removeable, notwithstanding any provisions of the said recited Act, and should not be removeable from any parish or place from which he or she would not be removeable by reason of any provision in the said recited Act."

By the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 34, "Where any person shall have resided for the term of three years in any parish in such manner and under such circumstances in each of such years as would in accordance with the several statutes in that behalf render him irremoveable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise."

Union; *Guardians of Highworth and Swindon Union* v. *Guardians of Westbury-on-Severn Union*; *Guardians of Medway Union* v. *Guardians of Bedminster Union.* (1) The judgments in those cases are consistent with the present appellants' contention. The earlier decisions, which are commented on and considered by the House of Lords, are inconsistent with each other, and also, in some instances, with the opinions expressed in the House of Lords, and cannot now be altogether relied upon. The case of *Reg.* v. *Leeds Union* (2) turned on a different statute, and the facts were different. [He also referred to *Reg.* v. *Inhabitants of St. Ebbe's* (3); *Reg.* v. *Inhabitants of Pott Shrigley* (4); *Reg.* v. *St. Olave's* (5); *Wolstanton and Burslem Union* v. *Northwich Union* (6); *Guardians of Holborn* v. *Guardians of Chertsey* (7); *Guardians of Dorchester Union* v. *Guardians of Weymouth Union* (8); *Overseers of Manchester* v. *Guardians of Ormskirk Union.* (9)]

Beven, for the respondents. The authorities shew that where a child under the age of sixteen has resided apart from his or her parent the child can acquire an independent settlement. In *Reg.* v. *Leeds Union* (2) similar arguments to those put forward in the present case were used on behalf of the appellants, but without success. That case was cited to the House of Lords in the cases already referred to, and apparently approved, and is a strong authority in the present respondents' favour.

[POLLOCK, B. If there is any distinction in substance between the two cases it is rather in the respondents' favour, because in *Reg.* v. *Leeds Union* (2) the pauper was an illegitimate child, whereas here the pauper is legitimate.]

The proviso in 11 & 12 Vict. c. 111, has no such effect as is contended for on behalf of the appellants. Its object, as pointed out by Cockburn, C.J., in *Reg.* v. *Leeds Union* (10), was to prevent the dispersing of different members of a family. [In addition to

(1) 14 App. Cas. 465.
(2) 4 Q. B. D. 323.
(3) 12 Q. B. 137; 18 L. J. (M.C.) 14.
(4) 12 Q. B. 143; 18 L. J. (M.C.) 33.
(5) Law Rep. 9 Q. B. 38.
(6) 46 L. T. (N.S.) 528.
(7) 14 Q. B. D. 289; reversed 15 Q. B. D. 76.
(8) 16 Q. B. D. 31.
(9) 24 Q. B. D. 678.
(10) 4 Q. B. D. at p. 325.

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the authorities already mentioned, he also referred to *Rex* v. *Inhabitants of Halifax* (1); *Rex* v. *Inhabitants of Roach* (2); *Rex* v. *Inhabitants of Bleasby*. (3)]

Jelf, Q.C., replied.

POLLOCK, B. In my opinion, our judgment in this case ought to be in favour of the respondents.

Mr. Jelf, for the appellants, contends that, looking at the legislation which has been referred to with regard to settlement and removal, and particularly ss. 34 and 35 of the Divided Parishes Act, 1876 (39 & 40 Vict. c. 61), and 11 & 12 Vict. c. 111 (passed to alter the proviso previously contained in 9 & 10 Vict. c. 66, s. 1), and looking at the interpretation of the law on the subject by the House of Lords in *Guardians of Reigate Union* v. *Guardians of Croydon Union* (4), and the two other cases which were argued together with that case, the result is that the law as it now stands is independent of the earlier case law, and the result of the legislation and decisions is to do away with the status of irremoveability so far as relates to infants. That is substantially the effect of his argument. It is necessary to consider, first, what the law was before the different Acts were passed; and secondly, what the intention of those Acts was; and there is another clear rule to be observed, which is this, that unless it is absolutely necessary no Court should attribute to an Act of Parliament an effect which it does not express. Here there is no expression of any such intention as has been suggested on behalf of the appellants. The Act points to the undesirability of breaking up families, but it does not interfere with the existing law as to the effect of residence in conferring a status of irremoveability. It had been decided in many of the earlier cases, that a child under the age of sixteen could by residence obtain a settlement for itself, and in the cases in the House of Lords, to which I have already referred, Lord Watson went over the whole ground, and had his attention directed to all the cases cited before us to-day which had then been decided, and I can find in his judgment no such statement of the law as is contended for

(1) Burrow's Settlement Cases, 806.
(2) 6 T. R. 247.
(3) 3 B. & A. 377.
(4) 14 App. Cas. 465.

on behalf of the present appellants. Among the other cases cited to the House of Lords on that occasion was *Reg.* v. *Leeds Union.* (1) The judgment of Cockburn, C.J., in that case contains the following passage: "It has been argued that the proviso in 9 & 10 Vict. c. 66, s. 1 (as explained in 11 & 12 Vict. c. 111, s. 1), goes to shew that a child is irremoveable only where the parent is irremoveable, and that therefore the three years' residence under 39 & 40 Vict. c. 61, s. 34, ought not to give it a settlement distinct from that of its mother. But the proviso in question has really nothing to do with the case before us. It was enacted to prevent the dispersing of different members of a family. Here there is no question of separating the child from its parent, and we have simply to consider s. 34 by itself. This child has actually resided for three years in Seacroft; but it is contended that because the mother lived in another parish the child constructively resided with her, and where she resided. It is true that where a child is under the authority and control of its parent, it may, even when placed at a school in a different parish, be said to constructively reside with the parent. Here, however, the child had been entirely given up by its mother—it was not a suspension, but a virtual abandonment of the maternal right. Circumstanced as she was, she asked Oakes and his wife to take the child off her hands, and the child resided with them in another parish without any intention on the part of the mother to resume her rights. Mr. Poland has contended that under s. 34 there must be an intention on the part of the person residing to choose a residence; but nothing of the kind is expressed in the Act. The expression is simply "shall have resided." (2)

After stating his opinion as to the construction of the statutes, Lord Watson said: "The views which I have thus expressed with reference to the construction of s. 35 are not exhaustive, but they are sufficient to dispose of all the questions of law arising in these appeals; shortly stated, my opinion comes to this, that the effect of s. 35 is . . . . to fix absolutely the age of sixteen as the period of emancipation in all cases regarding the settlement of legitimate children, as had already been done in the case of

(1) 4 Q. B. D. 323.

(2) 4 Q. B. D. at pp. 324, 325.

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illegitimates" (1); and afterwards he expressed himself as follows: "I have been unable to find in s. 34 any provision, express or implied, to the effect that an emancipated child claiming a settlement under its provisions is not to have the benefit of residence whilst it was under the age of sixteen. The only provision having a bearing on the point is to be found in s. 35, which enacts that until emancipation the child 'shall retain' the settlement of its father or widowed mother. That provision does not necessarily imply that under the age of sixteen the child is not to have the benefit of previous residence. But even if it pointed to that result, I do not think that any mere implication derivable from it can be permitted to override the express enactment of s. 34. The only test of residence sufficient to give 'any person' a settlement under that section is, that it shall be such as would 'in accordance with the several statutes in that behalf render him irremoveable'; and the case of *Reg.* v. *Elvet* (2) is a clear authority to the effect that the pauper's residence under sixteen, coupled with her residence after she attained that age, did render her irremoveable in accordance with these statutes." (3) It is impossible to say that the effect of the previous decisions was not present to the mind of Lord Watson when he expressed himself as he did in the passages to which I have referred.

For these reasons, having regard to the state of the law as it existed before the Acts in question were passed, and to the state of the law after the Acts were passed, and to the effect of the Acts themselves, I am of opinion that our judgment ought to be for the respondents, and with costs.

VAUGHAN WILLIAMS, J. I am of the same opinion, and I conceive that we are only following the law as laid down by the House of Lords in the cases which have been referred to. In the present case the Court of quarter sessions has found that a pauper child had by service acquired a residence independently of her mother in the appellant parish. The question is whether she comes within s. 34 of the Divided Parishes Act, 1876. I am

(1) 14 App. Cas. at p. 484. (2) 2 E. & E. 266.
(3) 14 App. Cas. at pp. 486, 487.

of opinion that this pauper by residence in the appellant parish in service did acquire a status of irremoveability. As I understand the decision of the Queen's Bench Division in *Reg.* v. *Leeds Union* (1), that case shews that a child can by residence independent of its parents bring itself within s. 34 of the Divided Parishes Act. Mr. Jelf contends that this is not so, because of the proviso at the end of 11 & 12 Vict. c. 111; but that point is covered by *Reg.* v. *Leeds Union* (1), where Cockburn, C.J., said in his judgment: "It has been argued that the proviso in 9 & 10 Vict. c. 66, s. 1 (as explained in 11 & 12 Vict. c. 111, s. 1), goes to shew that a child is irremoveable only where the parent is irremoveable; and that therefore the three years' residence under 39 & 40 Vict. c. 61, s. 34, ought not to give it a settlement distinct from that of its mother. But the proviso in question has really nothing to do with the case before us. It was enacted to prevent the dispersing of different members of a family." (2) The same proposition is supported by the case of *Reg.* v. *Elvet.* (3) That case shews that where a child has resided with its parents for the specified period (which was then five years), the child acquires a status of irremoveability. There the pauper's father, after having acquired the status of irremoveability, had received parish relief; but all the judges who took part in the decision said that the child retained its status. That is a stronger case than *Reg.* v. *Leeds Union* (1), because in *Reg.* v. *Leeds Union* (1) the child had an independent residence; but in *Reg.* v. *Elvet* (3) the child had resided with its father, and it was held that, though the father after having acquired the status of irremoveability had received parish relief, the child would still keep that status. Apart from the observations of Lord Watson in the cases in the House of Lords, which have been already referred to, in my opinion the question now raised before us is disposed of by the short judgment of Lord Halsbury, L.C., in the same cases. He says: "The pauper had by more than the necessary period of residence acquired a status of irremoveability and so was 'settled' in the parish of Rhydgwern. It is true that during a part of that period she was under sixteen years of

(1) 4 Q. B. D. 323. (2) 4 Q. B. D. at pp. 324, 325.
(3) 2 E. & E. 266.

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age, and it is true that if it be assumed, as it was by the Court of Appeal, that unemancipated residence will not suffice, then she had not accomplished the necessary period of emancipated residence. The statute knows no such distinction. It makes the emancipated and unemancipated equally unremoveable; and if so the periods of emancipated and unemancipated residence may be put together." (1)

There is one other observation that I wish to make. Mr. Jelf appears to have lost sight of this fact, that the proviso in 11 & 12 Vict. c. 111, for preventing the disruption of families, applies whether the child has been residing with its parents or not. If the child comes to live with its parents for the first time in the last month of the three years, it acquires a status of inseparability from them just as much as if it had been living with them during the whole period of three years. I am of opinion that in the present case the pauper had acquired a status of irremoveability in the appellant union, and, that being her last legal place of settlement, the order of removal was right.

Judgment for the respondents.

Solicitor for appellants: *F. E. Hilleary.*
Solicitor for respondents: *H. T. Howard.*

P. B. H.

1892
May 9.

EAST LONDON WATERWORKS COMPANY *v.* KELLERMAN.

Waterworks—Rate—Sale of Freehold—Arrears due before Sale—Liability of Purchaser—50 & 51 *Vict. c.* 21, *s.* 4.

The effect of 50 & 51 Vict. c. 21, s. 4, is that a purchaser of the freehold of a dwelling-house is liable to a personal action at the suit of the waterworks company to recover arrears of water-rate which accrued due before the date of the purchase.

APPEAL by the plaintiffs from the judgment of the judge of the Bow County Court in favour of the defendant in an action to recover arrears of water-rate. In January, 1889, the defendant became tenant of certain premises under an agreement. He

(1) 14 App. Cas. at p. 480.

occupied the premises as tenant until July 1, 1891, when he purchased the freehold. On the same day he mortgaged the premises, but remained as mortgagor in possession. The rent of the premises did not exceed 20*l.*, and, therefore, by the East London Waterworks Act, 1853 (16 & 17 Vict. c. clxvi.), s. 81, the owner, and not the occupier, was liable to the payment of the water-rate. The water-rate was in arrear from January, 1889, when the defendant first became tenant, and the plaintiffs claimed to be entitled to recover the whole of the arrears by virtue of 50 & 51 Vict. c. 21, s. 4. (1) The defendant paid into Court the amount of the arrears which had become due after July 1, 1891, when he purchased the freehold, but denied liability for arrears due before that date, and the county court judge gave judgment in his favour.

Darling, Q.C. (*Kisch*, with him), for the plaintiffs, in support of the appeal. The defendant, when he purchased the freehold on July 1, 1891, became the owner, and as such is liable for arrears which were then due as well as for subsequent arrears. It is clear from 50 & 51 Vict. c. 21, s. 4, that these arrears are now a charge on the land, and this charge is expressly given without prejudice to the other remedies for enforcing payment against the owner; and it is provided that, without prejudice to the charge, the amount may be recovered from the owner. The purchaser ought to ascertain whether any arrears of water-rate are due when he purchases. If arrears are due, he probably pays so much

(1) By 50 & 51 Vict. c. 21, s. 4: "Where the owner and not the occupier is liable by law or by agreement with the water company to the payment of the water-rate in respect of any dwelling-house or part of a dwelling-house occupied as a separate tenement, no water company shall cut off the water supply for nonpayment of the water-rate; but such water-rate, without prejudice to the other remedies of the company for enforcing payment thereof from such owner, shall, together with interest thereon . . . . be a charge on such dwelling-house in priority to all other charges affecting the premises; and (without prejudice to such charge) the amount may be recovered, with the costs incurred, from the owner, or from the occupier for the time being, in the same manner as water-rates may by law be recovered." The section goes on to provide that proceedings shall not be taken against the occupier until notice has been given to him, and he has omitted to pay, and that no greater sum than the rent due shall be recovered from the occupier, who may deduct the amount paid from his rent.

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less as purchase-money. The effect of the section is that a purchaser takes the premises subject to a charge for arrears of water-rate, and at the same time becomes personally liable to the payment of such arrears. The county court judge appears to have thought that the mortgage made some difference, but this is an incorrect view.

Seth Smith (*Gilbert Purcell*, with him), for the defendant. The later Act has not enlarged the remedy in personam, which remains as it was by 34 & 35 Vict. c. 113, s. 48; and, therefore, the person who was owner when the rate accrued due is liable, and no one else. The waterworks company have no lien for arrears of rates: *Sheffield Waterworks Co.* v. *Wilkinson* (1), per Bramwell, L.J. The arrears incurred by the previous owner are not made a charge on the land.

[DAY, J. That contention is contrary to the express words of the Act.]

Even if there is a charge, the effect of the Act is not to make the defendant personally liable.

Darling, Q.C., was not called on in reply.

DAY, J. This is an appeal by the plaintiffs from the judgment of the county court judge in favour of the defendant in an action to recover arrears of water-rate. The defendant was formerly tenant of the premises in question, the rent of which did not exceed 20*l.*, and, therefore, he personally was not then liable in the first instance for the water-rate, but the owner was liable.

On July 1, 1891, the defendant became the purchaser of the reversion, and at the same time borrowed money on a mortgage of the property. He made default in payment of an instalment of the mortgage-money; but no proceedings were taken in respect of such default, and he remained mortgagor in possession. The fact that he had previously been in occupation of the premises as tenant is, however, immaterial. The defendant has paid into Court all the arrears of water-rate which became due after July 1, 1891, when he purchased the reversion. His liability to pay the previous rate depends on his subsequent title.

(1) 4 C. P. D. 410, at p. 422.

The fact that he formerly occupied as tenant is an accident, and the case may be considered as if it were not a case in which the tenant had purchased the reversion, and if the defendant is liable, he is liable not in respect of his previous title as occupier, but in respect of his present title as owner. Before 1887 the company could cut off the supply of water if the rate was in arrear; by 50 & 51 Vict. c. 21, s. 4, they are prohibited from doing this, but the arrears of the rate are to be a charge on the premises, and the owner or occupier is to be liable.

In cases where the rent does not exceed 20*l.*, the owner and not the occupier is liable, and that is this case. Therefore, in the present case, the previous owner was liable for the rates down to July 1, 1891, when he parted with the reversion. By s. 4 of the Act of 1887, the water-rate is made a charge on the premises, and it is contended on behalf of the plaintiffs that the defendant, by acquiring the reversion, became not only subject to this charge on the premises, but also liable to a personal action for the arrears. The last words of the clause (as to recovery of the amount) would be unnecessary if the section applied only to the person originally liable. The liability is imposed on the owner for the time being, and then there is a provision as to payment by the occupier, with power to the occupier to deduct the amount of the rate so paid from his rent. I am of opinion that a purchaser buys subject to the water-rate, and must pay that charge. If the occupier refuses to pay the rate, he may be sued for it, but he cannot be sued before such refusal. The owner for the time being ought to be in no better position where the rate is claimed from him than in the case of proceedings against his tenant, in which case he is practically compelled to pay the amount of the rate, because the tenant can deduct it from his rent. The owner may have no tenant. If the owner has no tenant, or if it is otherwise more convenient to claim the rate from him in the first instance than to claim it from the tenant, the owner may be sued. Having bought the premises subject to the liability for the water-rate, it is probable that he paid a less sum as the purchase-money. For these reasons I am of opinion that the decision of the county court judge was wrong, and that the plaintiffs are entitled to recover.

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CHARLES, J. I am of the same opinion. The Act of 1887 (50 & 51 Vict. c. 21), s. 4, made a difference in the state of the law as to the recovery of water-rates. Formerly, by the Act of 1847 (10 & 11 Vict. c. 17), s. 74, the company had the power of cutting off the supply of water in case of default in payment; but by the Act of 1871 (34 & 35 Vict. c. 113), s. 48, the company were bound to supply an incoming tenant, provided he restored the communication to the premises. The company then had, besides the power of cutting off the water, a personal remedy against the occupier, or, where the rent did not exceed 20*l.*, against the owner for the time being—that is, at the time when the water was supplied. The Act of 1887 made a change: it left the remedy by action for the debt where it was, and, without prejudice to that remedy, made the arrears a charge on the premises. It follows that a purchaser takes the premises subject to the charge, and with the liability to have an action brought against him for the arrears. In the same way the occupier would be liable to an action if he refused to pay the rate, which, if he paid it, he could deduct from his rent. The scheme of the Act is that the water is not to be cut off, but the arrears of rates are to be a charge on the premises, and the amount is to be recoverable from the owner. I am, therefore, of opinion that the decision of the county court judge was wrong.

Appeal allowed.

Solicitors for plaintiffs: *George Kebbell & Miller.*
Solicitors for defendant: *Morse Hewitt & Farman.*

P. B. H.

IN RE CHILD. EX PARTE CHILD.

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Feb. 11.

Bankruptcy — Act of Bankruptcy — Bankruptcy Notice — Judgment Debt — Limitation of Amount for which Bankruptcy Notice can be served — Distinction between Payment on Account of Judgment Debt and Counter-claim — Set-off or Cross-demand — Bankruptcy Act, 1883 (46 & 47 *Vict.* c. 52), s. 4, *sub-s.* 1 (*g*) — *Bankruptcy Rules*, 1886, *Appendix of Forms*, *No.* 6 (*Bankruptcy Notice*).

By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4, sub-s. 1 (*g*), a debtor commits an act of bankruptcy, "If a creditor has obtained a final judgment against him for any amount, and, execution thereon not having been stayed, has served on him . . . a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not within the time limited either comply with the requirements of the notice or satisfy the Court that he has a counter-claim, set-off, or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained":—

Held, that where part of a judgment debt has been paid, the creditor is not entitled to serve a bankruptcy notice in respect of the whole amount of such debt, inasmuch as he could not issue execution in respect of the part which has been paid.

APPEAL of the debtor, Alfred John Child, against an order of the registrar of the Wandsworth County Court dismissing his application to set aside a bankruptcy notice under s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883 (1), which had been served on him on November 26, 1891, by the respondents, the Queen Insurance Company.

Such notice was in accordance with Form No. 6 in the

(1) By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4, sub-s. 1 (*g*), a debtor commits an act of bankruptcy, "If a creditor has obtained a final judgment against him for any amount, and, execution thereon not having been stayed, has served on him in England, or, by leave of the Court, elsewhere, a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not, within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the Court that he has a counter-claim, set-off, or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained."

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Appendix of Forms to the Bankruptcy Rules 1886 (1), and purported to be in respect of 154*l.* 17*s.* claimed by the respondents "as being the balance due on a final judgment whereon execution had not been stayed." Such final judgment had been obtained in December, 1888, in an action brought by the respondents to recover from the appellant a sum due in respect of insurance premiums received by him as their agent.

On November 30, 1891, the appellant filed an affidavit in which he claimed that he had a set-off or counter-claim for a sum equal to or exceeding the sum claimed, within the meaning of s. 4, sub-s. 1 (*g*), "in respect of book debts assigned to the respondents after the date of the judgment in consideration of the withdrawal of a bankruptcy notice, and in respect of commission on premiums which the respondents' manager had agreed should be credited to him, and retained on account of such judgment till the same should be satisfied." On December 7, the application came on for hearing, and the registrar directed the appellant to file by December 11 a further affidavit giving particulars of his claim, and adjourned the hearing to December 14. The appellant failed to file such further affidavit by December 11, but filed on December 14 an affidavit containing a list of the book debts and sums for commission referred to,

(1) Bankruptcy Rules, 1886, Appendix of Forms, No. 6 (Bankruptcy Notice): "To A. B. (or A. B. & Co.) of ——, Take notice that within [*seven*] days after service of this notice on you, excluding the day of such service, you must pay to C. D. of —— the sum of £—— claimed by him as being the amount due on a final judgment obtained by him against you in the —— court, dated ——, whereon execution has not been stayed; or you must secure or compound for the said sum to [*his*] satisfaction or the satisfaction of the Court; or you must satisfy the Court that you have a counter-claim, set-off, or cross-demand against C. D. which equals or exceeds the sum claimed by him, and which you could not set up in the action in which the judgment was obtained."

Indorsement on Notice.

"*You are specially to note.*

"That the consequences of not complying with the requisitions of this notice are that you will have committed an act of bankruptcy, on which bankruptcy proceedings may be taken against you.

"If, however, you have a counter-claim, set-off, or cross-demand which equals or exceeds the amount claimed by C. D. in respect of the judgment, and which you could not set up in the action in which the said judgment was obtained, you must within —— days apply to the Court to set aside the notice, by filing with the registrar an affidavit to the above effect."

and estimating the former at 50*l.* 11*s.* 4*d.*, the latter at 118*l.* 2*s.* 6*d.* The registrar refused to receive the second affidavit in evidence on the ground that it had not been filed in time, and dismissed the application.

A. H. Carrington, for the appellant. The case should be remitted to the county court. The appellant is entitled to an inquiry. A bankruptcy notice cannot legally be served in respect of any part of a judgment debt which the judgment debtor has paid. If execution were threatened under such circumstances, the judgment debtor would be entitled to a stay of proceedings. Here the appellant cannot obtain credit for any payments which he may have made in reduction of the judgment debt, except by shewing that the bankruptcy notice claims more than is due. Payments on account of the judgment debt cannot be made a subject of counter-claim, set-off, or cross-demand.

Herbert Reed (with him, *F. Mellor*), for the respondents. The Court should not interfere. On an application to set aside a bankruptcy notice, the burden of proof is on the debtor. Under the Act of 1869 a secured creditor could issue a debtor's summons: *In re Tupper* (1); *Ex parte Mauritz, In re Giles.* (2) Under the present Act the fact that, owing to interpleader proceedings, execution has proved to be available in respect of part only of the judgment debt, does not defeat the right of the judgment creditor to serve a bankruptcy notice: *In re Bates, Ex parte Lindsey.* (3) The facts alleged in the affidavits are mere evidence of a counter-claim.

A. H. Carrington, in reply. It is contended that the bankruptcy notice is invalid, and that the respondents themselves have in equity prevented the appellant from complying with its requirements. [He cited *Ex parte Ide, In re Ide* (4); and *In re Sedgwick, Ex parte Sedgwick.* (5)]

VAUGHAN WILLIAMS, J. This matter must go back to the county court. I wish to state my view of this part of the subsection. I think that under it a creditor who has obtained final

(1) Law Rep. 9 Ch. 312.
(2) Law Rep. 5 Ch. 779.
(3) 4 Morrell, 192.
(4) 17 Q. B. D. 755.
(5) 5 Morrell, 262.

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judgment is not entitled to serve a bankruptcy notice in respect of any amount greater than that for which he could have issued execution, and that, therefore, if the circumstances of the case are such that he has ceased to be entitled to issue execution for the whole amount of the judgment debt, he has ceased to be entitled to serve a bankruptcy notice for the whole amount of the judgment debt. The clause provides that when a bankruptcy notice has been served, two alternative courses are open to the judgment debtor—compliance with its requirements or proof of a counter-claim, set-off, or cross-demand of the requisite amount. I desire to say that it is, in my opinion, only when it appears that the bankruptcy notice has been properly served—that is, that it has been served in respect of an amount for which execution could issue—that it becomes obligatory on the judgment debtor to take either the one or the other of these two alternative courses; though, when once this does appear, it is of no avail for him to shew statutory compliance or a statutory counter-claim, set-off, or cross-demand to an extent, for example, of 199*l.* as against a judgment debt on which execution could issue of 200*l.* A judgment debt of 1*l.* would still remain due.

The distinction suggested by the learned counsel for the judgment debtor between payment and set-off is, in my opinion, well founded. If it is true that in this case the judgment debtor has paid to the judgment creditors part of the judgment debt, it is clear that the judgment debtor cannot recover the sum so paid in any form of action, and the judgment creditors ought not, therefore, in my opinion, to be allowed to say, in answer to his case against the bankruptcy notice, that his payment on account is a counter-claim, set-off, or cross-demand for a less amount than that of the judgment debt, and therefore one which is expressly excluded by the terms of the clause.

The view that the legislature intended that a bankruptcy notice should simply state the amount of the original judgment debt without allowing for subsequent payments on account does not seem to me in accordance with decided cases. The fact that my brothers Mathew and Cave, in *In re Bates, Ex parte Lindsey* (1), thought it necessary that a bankruptcy notice in

(1) 4 Morrell, 192.

that form should be amended, goes far, in my opinion, to shew that the proper practice is to give credit for amounts paid and to issue the notice in respect only of the balance remaining due. It is true that Mathew, J., alludes in his judgment to the circumstance that there was in that case the equivalent of a stay of execution as regards the amount deducted; but I think the more natural view of the ratio decidendi is that the Court considered that a bankruptcy notice could only be served for the amount for which execution could be issued. As I understand the law, when money has been paid and accepted in part satisfaction of a judgment debt, and a writ of fi. fa. is afterwards issued for the full amount, the judgment debtor need not wait till execution has taken place, but is entitled, as soon as the abuse of the process of the Court has taken place, to a stay of execution as regards the amount paid.

As I take this view of the meaning of the clause, it is not necessary that I should determine the true effect of the words "on which execution has not been stayed," or decide whether, if the case for the judgment debtor should be true, the judgment creditors ought to be held to have themselves prevented him from complying with the requirements of the notice. It can scarcely, I think, have been the intention of the legislature that a judgment debtor should be liable to be served with a bankruptcy notice claiming from him a sum which is not due, inasmuch as it has been paid by him and accepted by the judgment creditor in reduction of the judgment debt; and when I consider Form No. 6, and the notice indorsed on that form, I think they shew a clear intention that a judgment creditor, in serving a bankruptcy notice, shall deal with the sum which is really due in respect of the judgment debt, and with that sum alone. The case must, therefore, go back to the registrar in order that he may ascertain whether all, or, if not all, part of the judgment debt has been paid.

COLLINS, J. I am of the same opinion. The learned counsel for the respondents contended that, under s. 4, sub-s. 1 (*g*), of the Act, they had primâ facie, as judgment creditors, a right to serve the judgment debtor with a bankruptcy notice for the

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amount of the judgment debt, and that, even admitting the case which the judgment debtor had attempted to set up before the registrar to be true, their right, in this respect, would not have been displaced. I felt some difficulty, for the clause treats the right of a judgment creditor to issue a bankruptcy notice as co-existing with an obligation on his part to admit a claim by the judgment debtor, and it seemed to me, therefore, that the respondents here might be entitled to serve the appellant with a bankruptcy notice claiming the whole of the judgment debt, even though it might appear that the appellant had a claim against them for a sum falling just short of that amount. But the learned counsel for the respondents pointed out, that whereas payment by a judgment debtor of any part of the judgment debt would defeat the right of the judgment creditor to issue execution for the full amount, and would be a good ground for a stay, if one had not already been obtained, as regards the sum paid, the fact that the judgment debtor had "a counter-claim, set-off, or cross-demand which equalled or exceeded the amount of the judgment debt," would be no ground for a stay of execution. This at once brings the case within Lord Esher's comment in *Ex parte Ide, In re Ide* (1), where he says that the words of the clause "necessarily imply that the judgment is one upon which execution can go immediately, unless it is stayed."

The first matter to be settled therefore is, Are the respondents in a position to issue execution for the sum claimed as due in the bankruptcy notice? They are not entitled to issue execution, and it would be inequitable that they should be, in respect of any part of this sum which proves to have been paid by the judgment debtor. They are entitled to issue execution notwithstanding that he may be shewn to have a "counter-claim, set-off, or cross-demand," for an equal or a greater amount. If, therefore, on investigation it proves that only a few pounds of the judgment debt remain unpaid, the judgment creditors have final judgment for this sum, and the judgment debtor must either pay it or prove a "counter-claim, set-off, or cross-demand" for an equal or greater amount within the meaning of the clause. On the other hand, if, as appears to be suggested, the judgment

(1) 17 Q. B. D. 755.

debtor proves to have paid more on account than the full amount of the judgment debt, he will be entitled to have the bankruptcy notice set aside. The case must be remitted to the registrar, in order that the facts may be ascertained.

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Appeal allowed.

Solicitors for appellant: *W. J. Child & Son.*
Solicitors for respondents: *Robins, Cameron & Co.*

H. D. W.

[CROWN CASE RESERVED.]

1892
Feb. 13.

THE QUEEN *v.* DUCKWORTH.

Criminal Law—Attempt to discharge Loaded Arms—Evidence for the Jury—24 & 25 Vict. c. 100, s. 18.

On the trial of an indictment under 24 & 25 Vict. c. 100, s. 18, which enacts that whosoever shall unlawfully and maliciously, "by drawing a trigger or in any other manner," attempt to discharge any kind of loaded arms at any person with intent to do grievous bodily harm, shall be guilty of felony, it was proved that the prisoner drew from his pocket a loaded revolver and pointed it towards his mother. His wrists were seized by bystanders as he was raising the pistol, and after a struggle it was taken from him. During the struggle his finger and thumb were seen fumbling about the revolver, which cocked automatically when the trigger was pulled:—

Held, that there was evidence upon which the prisoner could properly be convicted of an attempt to discharge the revolver within the meaning of the statute.

Reg. v. *St. George* (9 C. & P. 483) overruled.

CASE stated for the opinion of the Court for the Consideration of Crown Cases Reserved, by Lawrance, J., at the Liverpool Assizes, held in December, 1891.

The prisoner was tried upon an indictment the fifth count of which was framed under 24 & 25 Vict. c. 100, s. 18, and charged that on November 19, 1891, he did "feloniously, unlawfully, and maliciously attempt to discharge at Elizabeth Kelly a certain loaded arm—to wit, a certain pistol loaded then in the barrels with gunpowder and divers leaden bullets, by drawing the said loaded arm from his pocket, and by pointing the same at the said E. Kelly, and by placing his finger on the trigger thereof, and by attempting to draw the trigger thereof, and by attempting to draw

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the said trigger for the purpose of doing grievous bodily harm to the said E. Kelly with intent in so doing to do grievous bodily harm to the said E. Kelly, against the form, &c., and against the peace," &c.

By 24 & 25 Vict. c. 100, s. 18, "Whosoever shall unlawfully and maliciously . . . . by drawing a trigger or in any other manner attempt to discharge any kind of loaded arms at any person with intent . . . . to maim, disfigure, or disable any person or to do some other grievous bodily harm to any person . . . . shall be guilty of felony, and being convicted thereupon shall be liable," &c.

It appeared from the facts stated in the case that on November 7, 1891, the prisoner went to the house of his mother, but she refused to admit him. He told her that he would buy a revolver and blow her brains out, and then he left. On November 19, 1891, he went again to his mother's house; but his mother refused to admit him, and he went away. He returned later the same evening and opened the door, which was unlocked, and walked into the room where his mother was sitting. He immediately pulled out of his pocket a six-chambered revolver fully loaded in two chambers with cartridges containing bullets and gunpowder, and pointed it towards his mother, so that a bullet would probably have struck her if it had been fired, saying, "I will give you this." A man named Newsham, who was present, seeing the prisoner take the revolver out of his pocket, seized him by the wrists as he was raising it towards his mother. A scuffle then took place, and the revolver was at length taken from the prisoner by Newsham and his son, who came to his assistance. The revolver was a very small one, and the handle, trigger-guard, and hammers were almost covered by the prisoner's hand; but his finger and thumb were seen to be fumbling in the revolver. The revolver cocked automatically when the trigger was pulled. It was explained by the man from whom the prisoner bought the revolver that it was difficult to discharge in consequence of the hammer, when being cocked, falling back between the thumb and the fore-finger used for pulling the trigger, thus preventing the hammer rising sufficiently to come to full-cock.

The prisoner was not defended by counsel. The case was left to the jury on the fifth count only, and Lawrance, J., directed them that if they believed that the prisoner did attempt to discharge the pistol at his mother by putting his finger on the trigger and attempting to pull it, and was only prevented by the interference of Newsham, they could convict the prisoner upon that count. The jury convicted him, and the learned judge's attention having been called to the cases of *Reg.* v. *St. George* (1), *Reg.* v. *Lewis* (2), and *Reg.* v. *Brown* (3), he stated this case at the request of counsel for the prosecution. The question for the opinion of the Court was whether the learned judge's direction was right.

Cottingham, (*Tobin*, with him), for the Crown. This case was stated because of the decision in *Reg.* v. *St. George.* (1) Parke, B., held, with reference to the words, "by drawing a trigger or in any other manner," occurring in 7 Wm. 4, and 1 Vict. c. 85, ss. 3, 4, that "in any other manner" meant in some manner ejusdem generis with pulling the trigger, as by striking a percussion-cap with a hammer, and that where the prisoner attempted to discharge a pistol by attempting to pull the trigger, but was prevented from pulling it by the interference of third persons, he could not be convicted of an offence within the Act. It is submitted that that decision was wrong. It was mentioned with disapproval in *Reg.* v. *Brown* (3), as was the case of *Reg.* v. *Lewis.* (2) There was ample evidence here of an attempt within 24 & 25 Vict. c. 100, s. 18. The facts bring this case within the definition of what constitutes an "attempt" in Stephen's Digest of the Criminal Law, art. 49, p. 29: "An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted."

[HAWKINS, J. It does not appear from the case that the question with what intent the prisoner attempted to discharge the pistol was left to the jury; unless they found that he

(1) 9 C. & P. 483. (2) 9 C. & P. 523.

(3) 10 Q. B. D. 381.

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discharged the pistol with some intent mentioned in the statute, he ought not to have been convicted.]

The fifth count only was left to them, and that charged the prisoner with the intent to do grievous bodily harm; all the facts leading up to the attempt to discharge the pistol were before them, and by their verdict of guilty on the fifth count they must be taken to have found the intent laid in that count.

[HAWKINS, J. My learned brother Lawrance tells us that he did in terms leave the question of "intent" to the jury. His statement removes entirely the only difficulty I felt about the matter.]

No counsel appeared for the prisoner.

LORD COLERIDGE, C.J. I am clearly of opinion that this conviction should be affirmed. The case was stated by the learned judge upon the point, not of intent, but of attempt, and it was stated because of two cases, which decided whether or not an attempt could be inferred under the particular circumstances of those cases. In the case before us to-day we are all clearly of opinion that there was abundant evidence that the prisoner attempted, "by drawing the trigger or in any other manner," as the words of the statute go, to discharge the pistol within the meaning of 24 & 25 Vict. c. 100, s. 18. The two cases, which were brought to the attention of the learned judge at the trial, were, to my mind, very distinguishable the one from the other. In *Reg.* v. *Lewis* (1) I should have thought that there was fair reason on the facts—not making it any question of law—to doubt whether there had been an attempt, "by drawing a trigger or in any other manner," to discharge a loaded firearm within the meaning of 7 Wm. 4, and 1 Vict. c. 85, s. 3, because the facts were that the prisoner did not raise the blunderbuss to his shoulder, and, it being a firearm discharged by means of a flint, there was no flint in it. There was, therefore, a serious question whether a man could attempt to discharge a firearm which in fact could not possibly be discharged. I do not say how that question would be decided at the present day; but at all events there is something to be said upon the point. As regards the other

(1) 9 C. & P. 523.

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THE QUEEN v. DUCKWORTH.

Lord Coleridge, C.J.

case—*Reg.* v. *St. George* (1)—I should have thought, with great deference, that it ought to have been got rid of by this time. There the prisoner raised his arm and pointed a pistol at another person, and he had his hand upon the trigger. So far as raising his arm and pointing the pistol were concerned, he did all that he could do to discharge it, and then other persons interfered, and took the pistol from him, and the attempt ended there. I should think it reasonably clear to most ordinary minds that there had been an attempt to do what was prevented from being done by the interference of third persons. As to the case now before us, where the facts are of the same character as in *Reg.* v. *St. George* (1), I think we are all clearly of opinion that there was abundant evidence to be left to the jury, and to satisfy them, that there was the attempt charged in the fifth count of the indictment. The learned judge who tried the case tells us, as I should have assumed if he had not told us, that he specifically left to the jury the question of the intent which the prisoner had when he attempted to discharge the pistol. They were properly given the usual direction that a man must be presumed to intend the natural consequences of his acts. Therefore, neither on the question of attempt, as to which we are all clear, nor on the question of intent, which has been made clear by the learned judge's statement, does there seem to be any doubt that this conviction was right, and should be affirmed.

The rest of the COURT (Hawkins, Wills, Lawrance, and Wright, JJ.) concurred.

Conviction affirmed.

Solicitor for the Crown: *The Solicitor of the Treasury.*

(1) 9 C. & P. 483.

W. A.

1892
May 12.

RAY AND ANOTHER *v.* WALKER AND OTHERS.

Lands Clauses Acts—Railway Company—Sale of Superfluous Lands—Covenant to resell a Portion—Invalidity of Sale—Extent of—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 127.

A railway company sold to a purchaser for a lump sum a plot of land which was not required by them for the purposes of their undertaking. The conveyance contained a covenant by the purchaser to resell a certain defined portion of such land to the company whenever he might be required by them to do so:—

Held, by Cave, J., that although such covenant to resell, being in contravention of s. 127 of the Lands Clauses Consolidation Act, vitiated the sale of the portion of the land to which the covenant related, it did not affect the validity of the sale of the other portion.

London and South Western Ry. Co. v. *Gomm* (20 Ch. D. 562) distinguished.

ACTION tried before Cave, J., without a jury.

In or about the year 1864 the Great Eastern Railway Company acquired certain lands for the purposes of their railway under powers conferred by the Great Eastern Railway Act, 1864. By the Great Eastern Railway Act, 1870, the time limited for the completion of the said railway by the Act of 1864 was extended to June 20, 1873. There was no further extension of such time. The said special Acts of 1864 and 1870 incorporated the Lands Clauses Consolidation Act, 1845, and did not prescribe any period within which superfluous lands should be sold by the company. Of the lands so acquired by the company under the Act of 1864 a plot of 2A. 0R. 10P., which was found not to be required for the purposes of the undertaking, was sold by the company to a Mr. Walker for a sum of 1000*l.*; but in the conveyance Mr. Walker covenanted that, if at any time the company should require him to do so, he would resell to them at the price of 4*l.* per perch a strip of 10 feet in width along the whole length of the land conveyed adjoining the railway. Mr. Walker died in August, 1887, having devised the land, the subject of the conveyance, to the defendants, since which date the defendants had been in possession of the land as such devisees.

The plaintiff, Mr. H. R. Ray, was the owner of land adjoining the land so conveyed to Walker, (the land conveyed lying

between Ray's land and the railway), and in November, 1891, the plaintiff Ray (who was a lunatic so found by inquisition) and the plaintiff A. L. Wheeler, as committee of Ray's estate, brought this action to recover possession of the said land from the defendants, on the ground that it was superfluous land which had not been sold within the time limited by s. 127 (1) of the Lands Clauses Act, 1845, and had consequently vested under that section in the plaintiff Ray, as the owner of the land adjoining thereto.

Beale, Q.C., and *W. Graham*, for the plaintiffs. The covenant by Walker that he would resell a portion of the land conveyed to him when called upon to do so rendered the sale to him void, for under s. 127 of the Lands Clauses Act, 1845, the conveyance by undertakers of superfluous land must be absolute and without reservation of any interest to the vendors, and a conveyance which reserves such an interest is ultrà vires: *London and South Western Ry. Co.* v. *Gomm.* (2) The avoidance of the sale to Walker applies to the whole plot conveyed to him, and not merely to the 10-foot strip; for the consideration of that sale was an entire one, the whole land being sold for a lump sum of 1000*l.* It being impossible to apportion the price among the different portions of the land, if the sale is bad in part it must be bad altogether.

Consequently, in 1883, when the time limited by s. 127 for the sale of superfluous lands acquired under the Act of 1864 expired, there had been no valid sale of the land in question, and it therefore vested in the plaintiff Ray.

The defendants cannot set up a title under the Statute of Limitations, for though they and their predecessors in title have

(1) By s. 127 of 8 Vict. c. 18: "Within the prescribed period, or if no period be prescribed within ten years after the expiration of the time limited by the special Act for the completion of the works, the promoters of the undertaking shall absolutely sell and dispose of all such superfluous lands, . . . and in default thereof all such superfluous lands remaining unsold at the expiration of such period shall thereupon vest in and become the property of the owners of the lands adjoining thereto, in proportion to the extent of their lands respectively adjoining the same."

(2) 20 Ch. D. 562.

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been in possession for more than twelve years, the plaintiffs' cause of action did not accrue till 1883.

Finlay, Q.C., and *Marcy*, for the defendants. The case of *London and South Western Ry. Co.* v. *Gomm* (1) does not apply except as to the 10 feet covenanted to be resold. In that case the covenant to resell extended to the whole of the land sold, whereas here it does not. It may be that the sale to Walker was bad as to the 10 feet, but that does not vitiate the conveyance of the remaining part of the land. But if so, then Walker was the owner of the land adjoining the 10 feet, and as such entitled to the 10 feet under s. 127, for his land lay between the 10-foot strip and the land of the plaintiff Ray. Secondly, assuming that the defendants are wrong on that point, they have a good title under the Statute of Limitations, for the plaintiffs derive their title from the company, and cannot have a better title than they had. The effect of s. 127 is to execute a conveyance from the undertakers to the adjoining owner; and the defendants clearly had a good statutory title as against the company.

[CAVE, J. The plaintiffs' title is derived from the legislature, not from the company.]

Beale, Q.C., in reply.

CAVE, J. This case raises a nice question under s. 127 of the Lands Clauses Act, 1845, which relates to the sale of superfluous lands. By that section the undertakers are bound within a certain limited time to sell any lands which they may have acquired which turn out to be superfluous; and, if they do not sell them within that limited time, such lands are without more to vest in the adjoining owner. Now, in this case the railway company, having lands which were admittedly superfluous, sold them to a Mr. Walker in August, 1876, at which date the time limited by statute for their sale had not expired. But the conveyance to Mr. Walker contained a covenant by him to resell to the company, in the event of his being required by them to do so, a small portion of the land—being a strip along the side of the railway to the extent of 10 feet in depth. And it was contended that that covenant made the sale a conditional sale, and

(1) 20 Ch. D. 562.

consequently void, that there was therefore no sale of the superfluous lands within the time limited, and that, there having been no such sale, they had consequently become vested in the plaintiff Ray as the adjoining owner. In support of that contention the case of *London and South Western Ry. Co.* v. *Gomm* (1) was relied upon. That was a case in which a railway company had sold a small portion of land adjoining their line to the defendant's predecessor in title, a Mr. Powell (who was the owner of other land adjoining the land so sold), and had taken from him a covenant to resell the whole plot of land to them if at any time they required it at the price at which they had sold it to him, and they sought to enforce that covenant against the defendant, who had purchased the land from Powell. The Court of Appeal held that the company were not justified in making a conditional sale of superfluous land, but were bound to sell it out and out, and that the defendant was entitled to hold the land discharged from the covenant on the ground that if the land was superfluous the sale to Powell was void, and that consequently, the land not having been sold at all, had vested in Powell as the owner of the adjoining land under s. 127; or that, if it was not superfluous land, the defendant and his predecessor in title having been in possession for more than twelve years, had acquired a good title against the railway company under the Statute of Limitations. In the present case Mr. Beale sought to carry that decision a good deal further and to maintain that, inasmuch as there was a reservation of a right to repurchase the 10-foot strip along the frontage of the railway, the sale of the whole plot of land was void, and the whole plot consequently vested in the plaintiff as the adjoining owner. But I am not prepared to carry the doctrine of *London and South Western Ry. Co.* v. *Gomm* (1) to that length. I am of opinion that although such reservation may have avoided the sale so far as the 10-foot strip was concerned, it did not affect the validity of the sale of the residue. But if so, then the plaintiff cannot succeed. For if such strip was superfluous land which still remained unsold in 1883 by reason of the reservation, then it vested no doubt in the adjoining owner; but the adjoining owner was not the plaintiff, but Mr. Walker, as owner of the

(1) 20 Ch. D. 562.

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residue of the land sold by the company, the validity of the sale of which, as I have said, was not affected by the reservation, and which lay between the 10-foot strip and the plaintiff's land. My judgment must be for the defendants.

Judgment for the defendants.

Solicitors for plaintiffs: *Blunt & Lawford.*
Solicitors for defendants: *Walker & Battiscombe.*

J. F. C.

C. A.
1892
May 5.

[IN THE COURT OF APPEAL.]

WILLETTS *v.* WATT & CO.

Employers' Liability Act—Master and Servant—Way used in Business of Employer—Defect in Condition of Way—Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-s.* 1.

The plaintiff was employed by the defendants as a workman in a large workshop where a part of their business was carried on. In the workshop was a catchpit generally covered with a lid. The lid was removed for a temporary purpose, and the plaintiff in passing from one part of the workshop to another in the course of his business fell into the catchpit and was injured. In an action by the plaintiff against the defendants:—

Held (differing from the judgment of the Queen's Bench Division), that the floor of the shop where the plaintiff was passing was a way within the meaning of the Employers' Liability Act, 1880, s. 1, sub-s. 1; but

Held, also, that the removal of the cover from the well did not constitute a defect in the condition of the way within the meaning of the section, and that consequently the defendants were not liable.

APPEAL from a county court in an action under the Employers' Liability Act, 1880.

The plaintiff, a hammerman in the employment of the defendants at their foundry works, sued in respect of a personal injury sustained by him in falling into a catchpit in the floor of a smith's shop where he was working at one of the defendants' steam-hammers. Evidence was given on behalf of the plaintiff that the catchpit was usually covered with a lid, but that at the time in question the lid had, without notice to him and without his knowledge, been removed by the order of the defendants' foreman.

The plaintiff stated that he fell into the catchpit whilst he

was walking across the floor of the shop in going, in the course of his work, from his hammer to a steam-hammer situate in another part of the shop.

On the part of the defendants, it was proved that there was no defined path across the floor of the shop, but that when the catchpit was covered the workmen employed there—about twenty in number—moved and passed freely across the whole of the floor, except in so far as certain large obstacles upon it, such as tanks, scales, and hammers, compelled a person to take a particular direction by passing between or on one or other side of such obstacles.

The particulars of the claim alleged that the plaintiff was injured by falling into a pit or well, then in and forming part of the ways on the defendants' works, and that the said ways were defective in consequence of the pit or well being uncovered, unfenced, unwatched, and unlighted. The county court judge was of opinion that there was a defect in the condition of the ways at the defendants' works within s. 1, sub-s. 1, of the Employers' Liability Act, 1880, and that such defect was caused by the negligence of the defendants' foreman, and so directed the jury, who returned a verdict for the plaintiff for 150*l.*, for which judgment was entered.

The defendants appealed.

1892. Jan. 22. *Hugo Young*, for the defendants. The spot in question was not a way within s. 1, sub-s. 1, of the Act, which means something set apart and defined for that purpose.

Even if the spot was a way, there was no defect in its condition; for to constitute this there must be something of a permanent or quasi-permanent nature, and the removal of the lid of the catchpit caused at most only a temporary obstruction. [He cited *McGiffin* v. *Palmer's Shipbuilding Co.* (1), and *Pegram* v. *Dixon.* (2)]

Disturnal, for the plaintiff. It is not necessary that a way should be defined. Every portion of the area of the floor of this shop over which the workmen could pass was a way. The test is whether the spot is capable of use for the purpose of passage. Judged by that test, the spot where the catchpit was placed was

(1) 10 Q. B. D. 5. (2) 55 L. J. (Q.B.) 447.

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clearly a way. Even if definition is necessary to constitute a way, the obstacles upon the floor of the shop practically defined the way.

HAWKINS, J. I am of opinion that judgment should be entered for the defendants on the ground that the place where the plaintiff fell was not a way within the meaning of s. 1, sub-s. 1, of the Employers' Liability Act, 1880. Had it been a way, I should have been of opinion that there was a defect in the condition of it; but in the view which I take it becomes unnecessary to decide that point.

There is no definition in the Act of the word "ways." The question is, whether the place in question in this case was part of a way connected with or used in the business of the employers. The only case in which the facts throw any light upon the point in the present case is *McGiffin* v. *Palmer's Shipbuilding Co.* (1) Part of the judgment of Field, J., in that case, shews the view which that learned judge took of the meaning of the word "ways." He said (2): "It seems to me that the legislature, in using the word 'way,' means not a right of way, not the right to walk up and down on this race, but it means a thing, something which is the property of the employer, which it is his duty to find and use, or which he does in any way use in the business. Here the word 'way' means a material thing, which may be used within, or used in connection with, the business of the employer." I think myself that when one looks at the facts in this case those words of Field, J., are applicable. Here there was a large workshop about fifty feet square. In this shop were large steam-hammers, scales, tanks, &c.—indeed, the whole shop was occupied by the things used in the business. There does not seem to me to have been any defined way across the shop. I confess that I cannot suppose that the legislature meant, in s. 1, sub-s. 1, of the Act, that every place which could be used for the purpose of passage from one part to another was a way. I think that what was meant was some place pointed out for use as a way. Here there was no such place marked out or indicated; there was no defined or special way over which people were expected to pass.

(1) 10 Q. B. D. 5.

(2) 10 Q. B. D. at p. 8.

It has been contended that the whole floor was a way because the whole could be used for passing from one part to another; but it seems to me that it is not possible to say that every unobstructed portion of the ground was a way; except for the fact that there were certain obstacles upon the ground, there is no pretence for saying that here there was any defined line of way. The plaintiff's counsel urged that any place in respect of which it might be said to a person, "The way is over here," or "over there," would be a way within the Act. But if that were so, the whole area of this shop was a way, not because people habitually used it as such, but because they might do so if they chose.

WILLS, J. I am of the same opinion. The word "ways" in s. 1, sub-s. 1, of the Act does not stand by itself, but it is coupled with the words "connected with or used in the business of the employer"—that is to say, as a general rule, more or less habitually used as part of the method of carrying on the employer's business, though possibly this phrase might, under exceptional circumstances, apply to a way although it was only being used for the first time. In this case there are no indications of such circumstances. If the contention of the plaintiff's counsel were correct, every line which could be drawn across these premises in any direction would be a way. That would be, as it seems to me, nearly equivalent to saying that all parts of the area of this shop over which it was physically possible for the workmen to pass were "ways." But I think that by that word is meant, generally at all events, habitual lines or tracks of passage. The evidence in the case is very scanty; but I do not see any evidence that this particular line of passage had ever been used by any one else than the plaintiff either before or since the injury to him, or that it was one which he was specially directed to take. It appears to me therefore impossible to say that this spot was part of a way, and was therefore within the word "ways" in the Act.

Judgment for the defendants. Leave to appeal.

P. B. H.

The plaintiff appealed.

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WILLETTS v. WATT & Co.

1892. May 5. *Channell, Q.C.*, and *Peile*, in support of the appeal. It is not necessary that there should be a defined way. A place over which workmen ordinarily go for purposes connected with the business is a "way" within the meaning of the Act. The Court below acted on *McGiffin* v. *Palmer's Shipbuilding Co.* (1); but in that case Field, J., was considering the question of obstruction to a way, and not trying to define a way. If in such a case as the present a master seeks to limit his liability he can make a definite track and regulations; but if he allows workmen to use all the floor he makes the whole of it a way within the meaning of the Act.

Hugo Young, contrà. If this is a way every line between any two points is a way if there is no obstruction. That is not the sense in which the words are used in the Act. Here there was a large open space in the middle of the shop, part of which was temporarily occupied by a steam drum, and the route taken by the plaintiff would not under ordinary conditions be treated as a way. Even if it is a way there is no defect, because a defect is something different from an obstruction, and must be of such a nature that it can be remedied: *Hedley* v. *Pinkney & Sons' Steamship Co.* (2); *Walsh* v. *Whiteley.* (3)

LORD ESHER, M.R. In this case the plaintiff was a workman employed by the defendants, and he sues under the Employers' Liability Act, 1880, in respect of injuries sustained by him through falling into an unused well or catchpit unexpectedly opened without his knowledge in the place where he was at work. The case was tried in the county court, and the plaintiff recovered 150*l.* There was an appeal to the Divisional Court, who disagreed with the result arrived at in the county court, and directed judgment to be entered for the defendants, and on this the plaintiff has appealed to this Court. The case was this: there was a large room on the premises of the defendants some 150 feet by 50 feet, in which a great part of their business was carried on. In this workshop there were places where different workmen performed different portions of the work, and in one

(1) 10 Q. B. 5.

(2) [1892] 1 Q. B. 58.

(3) 21 Q. B. D. 371.

part there was this catchpit, which had not been opened for five years. Something unusual in respect of a cylinder which was to be tested caused the foreman to direct that the well should be uncovered, and when this was done the cylinder was placed half over it, leaving the other half open, and it is obvious that the lid could not be put back so long as the cylinder remained there. The objection taken on behalf of the defendants is that this portion of the shed is not a "way" within the meaning of s. 1, sub-s. 1, of the Employers' Liability Act, 1880. The plaintiff's advisers had rested their case on that sub-section, and alleged that at this spot there was a way which was not in a proper condition, and in their particulars described the accident as due to the unsafe condition of this way. The county court judge appears to have told the jury to assume that this was a way and that there was a defect, and on that footing there was a verdict and judgment for the plaintiff. The Divisional Court set aside that judgment on one ground only, that this was not a way within the meaning of the section; but they have given leave to appeal, and the appeal is not merely on the particular point on which they decided, but generally whether there could properly be judgment for the plaintiff.

It seems to me impossible to give an exhaustive definition of what is and what is not a way within the Act. We have to deal with the passage of workmen across a workshop, and to say whether the place where they make this passage may properly be termed a "way." The evidence is that the plaintiff was not going across the shop for his own pleasure, but was going from a place where he had work to do to another place where other workmen had their work to do, on matters connected with the work he was on. The line he took is said not to be a way because it is not marked out or defined, and the Divisional Court have come to that conclusion; and it is further said it is not a "way" because it is not habitually used as such. The second of these arguments is not tenable, for if it were the Act would not apply to the first user of a way, however defined it might be, but would only apply after considerable user of it. I cannot, therefore, regard habitual user as necessary. Nor do I think that it is necessary the way should be marked out and defined. If a way passes where the user

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Lord Esher, M.R.

would make no mark and where there are no defined boundaries, is it to be said that is not a way within the Act? Difficulties in so holding have been pointed out in the course of the argument, and I cannot come to that conclusion. The definition which strikes me as sufficient for the determination of this case is—the course which a workman would in ordinary circumstances take in order to go from one part of a shop, where a part of the business is done, to another part where business is done, when the business of the employer requires him to do so, must be regarded as a "way" within the meaning of the statute. On this point, therefore, I disagree with the Divisional Court as to the ground they have given for their judgment.

Another point was argued before the Divisional Court, but not decided. Assuming this to be a way used in the business of the employer, was there any defect in its condition? It would be an ordinary way from one part of the shed to another, so constructed that there was in it a covered well. There was nothing wrong with the construction of the well or of the lid which covered it. The lid was there for the purpose of being taken off if occasion required, and on this occasion it was taken off, and left this hole in the middle of the way. The only mode of rendering the way safe was to give proper warning of its condition, and the person who failed to give this warning was the foreman entrusted by the employer with the superintendence of this matter. There is some evidence for the jury of his negligence in this respect, and that is a matter which might come within sub-s. 2. The particulars, however, confined the plaintiff to the 1st sub-section, and shut him out from relying on the second. The case must be considered only under sub-s. 1, and no defect in the way is shewn, but only a negligent user. Although, therefore, I disagree with the reason for their judgment given by the Divisional Court, it must be supported on another ground, and, therefore, the appeal will be dismissed.

We have power to make such order as may be just and right for determining the matter in dispute between the parties, and we have come to the conclusion that we ought to give the plaintiff an opportunity of having a new trial. The order we make is that the plaintiff must pay the costs here and in the Divisional

Court, but that he is to be at liberty to retry the case on amended particulars, and that the costs of the former trial will abide the event.

FRY, L.J. Two questions arise on this case for discussion: first, whether the spot where the accident to the plaintiff happened was part of a "way" within the meaning of s. 1, sub-s. 1, of the Employers' Liability Act, 1880, and, second, whether there was a defect in the way. I shall not attempt to give an exhaustive definition of what is a "way" within the meaning of the statute; all we are called on to do is to consider the meaning of the expression so far as to enable us to elucidate this case. I am not of the opinion expressed by the learned judges in the Court below, that a way must be marked out by metes and bounds or by user. In determining what is a "way" we should, I think, look to the fact that workmen have to go through places where sometimes there is an open space, while at other times what was an open space is covered with stores or other things used in the business. We should consider, further, the case of an open yard where the whole or only a small part might be used at any time according as there were a great many or only a few workmen going through it. I think that these and other considerations shew that we should answer in the negative the question whether metes and bounds are necessary to a "way" under the statute. There are many ways which persons have a right to use that are not defined by any physical boundary, and to hold that such a boundary is necessary would be to withdraw from the protection given by the statute a large number of places used by workmen in which the mischief at which the statute was aimed might arise. For the purpose of this case, I should say that wherever there is a large space connected with or used in the business of the employer, over which the workmen pass in the course of their employment, when that space is for the time being vacant, and is so used, it is a "way" within the meaning of the statute. Here there was a vacant space in the workshop which was used by the workmen in passing from one part of the shop to another according to the exigencies of their work. This appears to me to be a way within the meaning of the statute;

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and in this conclusion I find myself in disagreement with the Divisional Court. Then arises a further question, whether if this was a way there was a defect in it. It appears to me that the language of sub-s. 1 points to a defect of a chronic character and not to a defect arising from negligent user, and that view is supported by the judgment of the majority of this Court in *Walsh* v. *Whiteley* (1), where a defect of condition is contrasted with negligent user. The point for decision in this case seems to me to be under which branch the cause of action in this case comes. The way was properly constructed for a two-fold purpose — the well or catchpit might be used when required, or the place might be used for general purposes, including that of a way. It was properly adapted to subserve both these purposes, and the cause of the accident was not deficient construction, but that it was negligently used for one of the purposes without notice to persons who were using it for the other.

Under these circumstances, I think the judgment of the Court below should be supported, though for a different reason; and I think, in pursuance of the authority vested in us by s. 122 of the County Courts Act, 1888, we can make the order indicated by the Master of the Rolls, and that we ought to do so, in order to secure, in the words of the section, "the determination on the merits of the real questions in controversy between the parties."

LOPES, L.J. The question in this case is, and always has been, whether there is any defect in the condition of a way used in the business of the employer by which personal injury has been caused to the plaintiff. This resolves itself into two questions, whether there is a way, and whether, if so, there has been anything which constitutes such a defect in that way as is contemplated by the statute. The Divisional Court has held that the place where the accident happened was not a "way" on the ground, as it would seem, that to be a way it should either be marked out by metes or bounds, or habitually used as a way. With this conclusion I am unable to agree. I do not propose to give an exhaustive definition of the meaning of the expression

(1) 21 Q. B. D. 371.

"way," but only such an expression of what I conceive to be its meaning as will meet the requirements of this case. I should say that in a shop where workmen are employed, any part of the shop which a workman is required, or which it is his duty, to traverse in the course of his employment is a way within the meaning of the statute. The question whether there was a defect was raised but not decided in the Divisional Court. As to this, it appears that there was no defect in the original construction, nor in the subsequent condition of the way. It was not out of repair, but was still, as it had always been intended to be, a way with a well in it covered by a lid, and there was nothing wrong with the lid. The true mode of stating the facts of the case is that there was no defect in the condition of the way, but a negligent user of it. If so, the case is not brought within sub-sect. 1, to which the plaintiff is confined by his particulars. It may be that he has a cause of action under sub-sect. 2; and under these circumstances I agree that the plaintiff should have an opportunity of determining this by a new trial on the terms already stated.

Appeal dismissed.

Solicitors for plaintiff: *Wilcox & Taylor, Wolverhampton.*

Solicitors for defendants: *Keane, Rogers, & Co., for Rankin & Miller, West Bromwich.*

A. M.

1892
Feb. 4;
May 13.

IN RE WEST, KING, & ADAMS. EX PARTE CLOUGH AND ANOTHER.

Solicitor and Client—Past Costs — Oral Agreement to Pay Lump Sum—Retainer out of Money of Client in Solicitor's Hands—Payment—Application for Delivery of Bill.

A client employed a solicitor to transact for him certain business, partly contentious and partly non-contentious, and deposited with him a sum of money to be applied in payment of the costs to be incurred in such business. After the costs had been incurred, and before delivery of any bill, the solicitor and the client settled by oral agreement the amount of the costs at a lump sum, which sum the solicitor retained out of the money deposited with him. The client having subsequently become bankrupt, his trustee applied for the delivery of a bill of his costs by the solicitor :—

Held, that the retainer of the money by the solicitor did not amount to payment, and that a bill must be delivered.

APPEAL against an order of Pollock, B., in chambers, dismissing a summons for the delivery by a firm of solicitors of their bill of costs.

In August, 1891, one A. H. Elliott employed Messrs. West, King, & Adams, a firm of solicitors, to call his creditors together and endeavour to make an arrangement with them. At the same time Elliott deposited with the solicitors a sum of 100*l.* to cover their costs in connection with such business. The solicitors called meetings of the creditors and conducted negotiations with them, but unsuccessfully. They also defended certain actions on Elliott's behalf. No detailed bill of the solicitors' costs was ever delivered by them to Elliott; but, after the costs had been incurred, they orally agreed with him that the amount should be at 63*l.* 13*s.* 2*d.* Subsequently, on October 28, 1891, Elliott was adjudicated bankrupt. The solicitors deducted out of the 100*l.* in their hands the agreed amount of their costs, and they also paid thereout a sum of 8*l.* for the plaintiff's costs in one of the actions which they defended for Elliott unsuccessfully. The balance of the 100*l.* they handed over to Elliott's trustees. The trustees took out a summons for delivery of a bill of costs in all causes and matters in which the solicitors had been engaged for Elliott. The master dismissed the summons, and on appeal his order was affirmed by Pollock, B.

The trustees appealed.

Danckwerts, for the trustees. The trustees in bankruptcy of a client stand in the same position as the client himself as regards the right to demand delivery of a bill: *Clarkson* v. *Parker* (1); *In re Allingham* (2); and there is no ground in this case on which the solicitors could refuse delivery of a bill to their client. The verbal agreement as to the amount of the costs is of no binding force. Prior to 1870 a solicitor might make a verbal agreement as to costs already incurred. But now by the Solicitors Act, 1870 (33 & 34 Vict. c. 28), and the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), the agreement must be in writing, and signed by both parties: *In re Lewis, Ex parte Munro* (3); *In re Raven, Ex parte Pitt* (4), even though it relates only to past costs: *In re Russell, Son, and Scott.* (5) Secondly, the retainer by the solicitors of the amount of their costs out of the client's money in their hands does not amount to payment: *In re Stogdon.* (6) But even if it did amount to payment, the fact that the transaction took place on the eve of the client's bankruptcy is a sufficient special circumstance within s. 41 of 6 & 7 Vict. c. 73, to justify a reference to taxation after payment, and therefore equally would it justify an order for delivery of a bill after payment under s. 37 of that Act. No doubt in *In re Heritage* (7) it was held that in the absence of fraud or undue pressure there were no special circumstances to warrant an application for taxation after payment; but there the question arose between party and party, and not between solicitor and client. Further, the power of the Court to order delivery of a bill is wider than the power to refer it to taxation: *Duffett* v. *McEvoy* (8).

C. J. Peile, for the solicitors. The contention that the client is in all cases entitled to delivery of a bill cannot be maintained: *Turner* v. *Hand.* (9) In *In re Newman* (10) Lord Romilly pointed out that in cases in which, after the costs had been incurred, the amount is agreed at a gross sum and paid, the Court will not afterwards order delivery of a bill. And in *Stedman* v. *Collett* (11)

(1) 7 Dowl. P. C. 87.
(2) 32 Ch. D. 36.
(3) 1 Q. B. D. 724.
(4) 45 L. T. (N.S.) 742.
(5) 30 Ch. D. 114.
(6) 56 L. J. (Ch.) 420.
(7) 3 Q. B. D. 726.
(8) 10 App. Cas. 300.
(9) 27 Beav. 561.
(10) 30 Beav. 196.
(11) 17 Beav. at p. 614.

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the same judge laid it down that "the settlement of a solicitor's bill by the client for a fixed sum is valid, and will not be disturbed by the Court where it has been entered into fairly and with proper knowledge on both sides." Here there was a sufficient payment of the bill to deprive the Court of jurisdiction in the absence of special circumstances. The case of *In re Stogdon* (1) is distinguishable. There the money out of which the costs were retained consisted of rents received by the solicitor on behalf of the client as her agent; whereas here the money in the solicitors' hands was money deposited with them for the express purpose of being applied to the payment of their costs. Delivery of a bill can only be ordered under s. 37 of 6 & 7 Vict. c. 73, "in the same cases in which the Courts are authorized to refer a bill which has been delivered." And a bill can only be referred under s. 41 under special circumstances, of which there are none here. *In re Heritage* (2) is in the solicitors' favour on this point, as also is *In re Griffith, Jones & Co.* (3) In *Duffett* v. *McEvoy* (4), the words of the Victorian statute were different. There the Court was authorized to order delivery of a bill "in any case," and was by the very terms of the Act not limited to cases in which it was authorized to refer a bill to taxation. The Act of 1870 has not cut down the solicitor's right to accept payment of a lump sum for past costs, but has left the law on that matter untouched. In *In re Russell, Son, & Scott* (5) there had been no payment, which distinguishes that case from the present. Sect. 4 of that Act, indeed, provides that where an agreement in writing is made even as to past costs, the amount payable under the agreement "shall not be received" by the solicitor until the agreement has been examined by the taxing master; but those words mean, shall not be *recovered*, in the manner pointed out by s. 8, on motion or petition to the Court. It was not intended to affect the solicitor's right to receive payment of the agreed sum otherwise than under process of law.

Danckwerts, in reply. In *Duffett* v. *McEvoy* (4), Lord Blackburn said, that although the language of the Victorian Act was

(1) 56 L. J. (Ch.) 420.
(2) 3 Q. B. D. 726.
(3) 53 L. J. (Ch.) 303.
(4) 10 App. Cas. 300.
(5) 30 Ch. D. 114.

slightly different from that of the English Act, it only expressed what the English Act meant. *In re Griffith* (1), like *In re Heritage* (2), was a case between party and party.

Cur. adv. vult.

The judgment of the Court (Cave and Vaughan Williams, JJ.) was delivered by

CAVE, J. This is an appeal from a refusal of Pollock, B., to order a firm of solicitors to deliver a bill of costs under the following circumstances:—

Elliott, being in embarrassed circumstances, went to the solicitors in question, and instructed them to endeavour to make an arrangement with his (Elliott's) creditors. The solicitors with that object called meetings of the creditors, and did other work, but unsuccessfully. No bill of costs of any kind was presented; but Elliott and the solicitors verbally agreed the costs in the matter at 63*l.* 13*s.* 2*d.*, which sum the solicitors have retained out of money in their hands belonging to Elliott. Elliott subsequently filed his petition, and was adjudicated bankrupt. His trustees in bankruptcy are now applying for an order for the delivery by the solicitors of a bill of costs in respect of the work for which they have retained the 63*l.* 13*s.* 2*d.* The solicitors' answer is that the bill has been paid. It will clear the ground if we first dispose of two minor points.

First, as to the applicants being the trustees in bankruptcy, we will assume for the present purpose that the trustees have no greater right than the bankrupt could have had if he had not been bankrupt; but they certainly have no less: *In re Allingham.* (3) The application, therefore, may be treated precisely as if it had been made by the bankrupt himself before his bankruptcy.

Secondly, as to the verbal agreement as to the amount of costs. The statute which now governs agreements as to costs between solicitor and client in non-contentious business is the Solicitors' Remuneration Act, 1881, which enacts (s. 8, sub-s. 2) that such agreements shall be in writing, and signed by the party to be

(1) 53 L. J. (Ch.) 303.

(2) 3 Q. B. D. 726.

(3) 32 Ch. D. 36.

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charged. The last section of this Act excludes the Solicitors' Remuneration Act of 1870 as to all business to which the Act of 1881 applies.

Now, the Act of 1870 (33 & 34 Vict. c. 28) enacted by s. 4 that an attorney or solicitor might make an agreement in writing with his client respecting the amount of his costs amongst other things, which agreement, it was decided in *In re Lewis* (1), must be signed by both solicitor and client. It was further held, in *In re Russell, Son, & Scott* (2), where the business was contentious, that since the Act of 1870 a verbal agreement as to the amount of costs is not binding on the client. We are of the same opinion with regard to a verbal agreement as to the costs of non-contentious business under the Act of 1881. The verbal agreement here can, in our opinion, afford no answer to this application, and may be disregarded; though we think that if there had been here, as there was in the case of *Stedman* v. *Collett* (3), a perfectly fair agreement in writing signed by the client, that might have been a good answer to this application. The only defence, therefore, which we have to consider is that of payment.

The statute which confers the jurisdiction which we are asked to exercise is the Solicitors Act of 1843, and s. 41 is the section which deals with paid bills.

That section enacts that "the payment of any such bill as aforesaid shall in no case preclude the Court or judge to whom application shall be made from referring such bill for taxation," under certain conditions to which we need not refer.

Now the cases shew—and, independently of the cases, we should hold—that the bill there referred to is a delivered bill, otherwise there would be no bill to refer to taxation. In *In re Street* (4), Lord Romilly says, at p. 167: "I have held over and over again that there can be no payment within s. 41 of the Act" (i.e., of the Act of 1843) "before the bill has been delivered and the client has had the opportunity of seeing the items." See also *In re Blackmore* (5) and *In re Stogdon* (6), where Chitty, J., approves and follows *In re Street*. (4)

(1) 1 Q. B. D. 724.
(2) 30 Ch. D. 114.
(3) 17 Beav. 608.
(4) Law Rep. 10 Eq. 165.
(5) 13 Beav. 154.
(6) 56 L. J. (Ch.) 420.

In this case there has been no bill of any sort delivered, and, as we have said before, there is no agreement upon which the solicitor can rely which might possibly relieve him from the necessity of delivering a bill. There has been, therefore, in our opinion, no payment within the Act.

But we are of opinion, also, that in no sense has there been payment, and for this reason. The payment relied upon is the retainer by the solicitors of this 63*l.* 13*s.* 2*d.*—out of moneys in hand.

Now as to the retainer, Lord Langdale says, in *In re Bignold* (1), during argument: "I have never hitherto considered that the mere retainer by a solicitor out of moneys in hand of the amount of his bill amounted to payment, unless there has been a settlement of accounts;" and we have been able to find no case in which mere retainer has been treated as payment. It is true there are cases in which retainer by the solicitor has been treated as payment, even when no proper bill has been delivered (see also *Stedman* v. *Collett* (2)); but those are cases in which there was a valid agreement, which dispensed with delivery of a bill, accompanied by a settlement of account between the solicitor and the client. *In re Whitcombe* (3) and *Turner* v. *Hand* (4) are instances of such cases. But we can find, as we have said, no case in which mere retainer, apart from any settlement of accounts, has been treated as payment.

In this case we find that there was no settlement of accounts, but only a mere retainer by the solicitors, and we are of opinion that that is not in any sense payment.

With regard to the question whether an order for delivery should be made in a case where the Court would under no circumstances order taxation, we are not sure that we quite understand the argument. If it is that the power to order delivery given by the Act of 1843 is merely ancillary to taxation, and should not be exercised until it is shewn that the bill is one which at least it would have jurisdiction to refer to taxation, and that since that is not shewn delivery cannot be ordered, we do not agree with it, but respectfully concur in the judgment of the

(1) 9 Beav. at p. 270.
(2) 17 Beav. 608.
(3) 8 Beav. 140.
(4) 27 Beav. 561.

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Privy Council in *Duffett* v. *McEvoy* (1), in which they held that the two jurisdictions are quite distinct, and that the section in question (s. 37) does not bear the meaning which this argument would put on it. The power to order delivery has always been exercised irrespective of the question whether the bill may be a proper one to submit to taxation. It will be, as Lord Langdale said in *In re Blackmore* (2), for the applicants to consider, after they have received the bill, whether under the circumstances they will or will not apply for taxation.

If the argument is that, by s. 37, the existence of certain facts precludes the right to tax their solicitors' bill, which every one otherwise has under that section, and that, where any of these facts exist, the order for delivery should not be made, then again we think the argument fails. The evidence in this case discloses none of the necessary precluding facts, and we can see no hindrance to a taxation of this bill when delivered except that it might be found to be too fair and moderate to make it worth while.

The solicitors must deliver a bill of costs within fourteen days, and pay the costs.

Appeal allowed.

Solicitor for trustees: *R. Raphael.*

(1) 10 App. Cas. 300.

(2) 13 Beav. 154.

J. F. C.

LONDON COUNTY COUNCIL *v.* PEARCE.

1892
April 30;
May 3.

Metropolis—Management Acts—Metropolis Management and Building Acts Amendment Act, 1882 (45 & 46 *Vict. c.* 14), *s.* 13—"*Wooden structure or erection of a moveable or temporary character*"—*Builder's Pay-office on Wheels.*

A builder's office, constructed of wood and roofed with zinc, and placed upon iron wheels for the purpose of enabling it to be wheeled about to any place where building operations were being carried on, was, when not required at any such place, kept in the builder's own yard and used as a pay-office for his men:—

Held, that it was not a "wooden structure or erection of a moveable or temporary character" within the meaning of s. 13 of the Metropolis Management and Building Acts Amendment Act, 1882, and did not require a licence in writing from the London County Council for its erection.

CASE stated by a metropolitan police magistrate, in which the following facts appeared:—

A summons was issued on behalf of the appellants, the London County Council, against the respondents, charging them with having, on May 5, 1891, and on other days between that day and August 5, 1891, at 646, Holloway Road, unlawfully erected and set up a wooden structure or erection of a moveable or temporary character, without the licence in writing first had and obtained from the London County Council, contrary to the statutes 45 & 46 Vict. c. 14, s. 13, and 51 & 52 Vict. c. 41.

Upon the hearing of the summons it was proved that at the dates mentioned therein the structure in question was standing in the forecourt of the premises of the respondents, who were builders, at 646, Holloway Road, but that no building operations were going on there. The structure was made of wooden uprights and framing, lined internally and covered externally with match-boarding, and roofed with zinc, the dimensions being eight feet by six feet, and ten feet high, and on May 5 and August 5 it was used as an office. It was fitted with a desk and a small window through which to pay the men; it was placed on iron wheels, and constructed so that it could be wheeled where required. No licence in writing had been obtained from the London County Council.

It was contended for the respondents that this was not a

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structure or erection of a moveable or temporary character within the meaning of s. 13 of the Metropolis Management, &c., Amendment Act, 1882 (45 Vict. c. 14), for which a licence in writing from the London County Council was required.

The magistrate was of opinion that the structure in question was a pay-office on wheels forming part of a builder's plant, intended for use during building operations wherever required, and held that it was not a structure of a moveable or temporary character within the meaning of the Act, and dismissed the summons. The question for the opinion of the Court was whether he was right in his decision. (1)

Avory, for the appellants. The decision of the magistrate was wrong. Temporary buildings are dealt with in s. 12, and the intention of the legislature in s. 13 was to include a much larger class of cases than that covered by the previous section. The word "structure" was, therefore, used instead of "building," and covers cases where the erection is not actually built on the spot, but is constructed beforehand in some other place. The case is distinguishable from *Hall* v. *Smallpiece* (2), where it was held that caravans and a steam roundabout did not require a licence. In that case it does not appear that there was any actual occupation of the caravans and roundabout, while in the present case the shed was used as a pay-office, and was practically a part of the builder's office as it stood in the forecourt of his premises; while being so used it was a wooden structure or erection of a moveable or temporary character within the meaning of the Act. Under the

(1) By the Metropolis Management, &c. (Amendment) Act, 1882 (45 & 46 Vict. c. 14), s. 13: "It shall not be lawful for any person to erect or set up in any place any wooden structure or erection of a moveable or temporary character ... without a licence in writing first had and obtained from the Board [now the London County Council] for the erection or setting up of such structure or erection in such place. ... [The section then proceeds to affix a penalty to the erection of any such structure or erection without a licence, and proceeds:]

"Provided always, that a licence shall not be required in the case of any wooden structure or erection of a moveable or temporary character erected by a builder for use during the construction, alteration, or repair of any building, unless the same is not taken down or removed immediately after such construction, alteration, or repair."

(2) 59 L. J. (M.C.) 97.

proviso the builder would be liable if he kept it at works where building operations had been going on after such operations had finished, and he is equally liable if he keeps it on his own premises.

The respondents did not appear.

POLLOCK, B. This is a case stated for the purpose of raising the question whether this pay-office on wheels was a wooden structure of a moveable and temporary character within the meaning of s. 13 of the Metropolis Management, &c. (Amendment) Act, 1882, and the questions for us are whether the magistrate could properly find the facts which he has found, and whether, if he could so find them, he was right in saying that this structure was not within the Act. In my opinion, he was right on both points. The Act is one which deals with matters of every-day occurrence, and requires no application of special legal or technical learning to enable one to appreciate the meaning of the legislature. No special meaning can be given to the word "structure" or the word "erection" as something distinct from a building; and it cannot be supposed that the legislature intended that everything which could in any sense be called a wooden building of a temporary character should be within the section. It is the duty of the magistrate to say whether a particular thing (I purposely use an indefinite expression) is within the definition. It is obvious that there are many things which, in a sense, would be wooden structures or erections, but could not possibly be held to come within the section, such as a dog-kennel or a van for removing furniture, which would be a much larger and heavier thing than such a pay-office as that in question. There are, therefore, many considerations which ought legitimately to influence the magistrate in coming to his decision. I think that in the present case the learned magistrate was perfectly right in holding that this pay-office was a part of a builder's plant; it is a thing which is moved from one set of buildings to another as occasion requires, and when not in use in the ordinary way it is at rest upon the builder's premises, and is used for the convenience of paying his men, which seems a very reasonable proceeding. I do not base my decision upon

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the language of the proviso, which, I think, does not apply to the present case. If the proviso had used some such words as "structure erected for the purpose of paying the men," words to shew something specific in the nature of the user, it would have had more influence upon our decision; but it was inserted to meet the case of wooden buildings of whatever size erected by a builder to be used for some specific purpose during building operations, and it is unnecessary in the present case to call in aid the exemption which the proviso contains. I think that the magistrate was right in point of fact and in law in holding that this building was not within the Act.

VAUGHAN WILLIAMS, J. Having regard to the findings of fact by the magistrate, I think that he was right in holding that this building was not within the section. I do not in any way base my decision upon the proviso, for I think that the respondents have no need to rely upon the proviso at all: upon the findings of fact, this building does not seem to come within the operative part of the section. If it does not so come, then the builders are exempted from the necessity of obtaining a licence, not because the building falls within the proviso, but because it is not within the operative part of the section itself. Whether it does come within the operative part depends upon what is intended by the legislature by the words "wooden structure or erection." The magistrate was of opinion that primâ facie a carriage on wheels was not a wooden structure or erection within the meaning of the section. I do not mean to say that a man is to be allowed to evade the Act of Parliament by building on wheels what he intends to be a wooden structure, and then saying that it is not within the Act because it is on wheels. In all cases we must be guided by what I may call the intentions of the structure, and must inquire with what intention it was made. This seems clear from the case of *Hall* v. *Smallpiece* (1), where it was held that a steam roundabout was not a wooden structure or erection within the meaning of the Act. Why was that held? Not because a thing on wheels cannot be within the section, but because when one looks into the intention with

(1) 59 L. J. (M.C.) 97.

which the thing was made, it becomes plain that it was made for the purpose of locomotion and for erection in any place where it might be required. Assistance may be obtained from decisions given upon other statutes in pari materia, and I may instance the Metropolitan Building Act, 1855, under which the Court of Common Pleas, in *Stevens* v. *Gourley* (1), held precisely what we are holding now. Looking at the judgments in that case of Erle, C.J., Crowder and Byles, JJ. (I omit that of Vaughan Williams, J., who entertained some doubt), two of the three say in so many words that the basis of their decision was the intention of the parties who constructed the thing alleged to be a structure within the meaning of the Act. We must look at the finding of fact in the present case; and it is plain that the magistrate was of opinion that this was a box on wheels intended for use in building operations wherever required. I agree with his decision upon this finding, and decline to hold that this box on wheels intended for use in building operations wherever required is a structure within the meaning of this section at all.

Solicitors for appellants: *W. A. Blaxland.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.

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May 18.

LUCAS *v.* WILLIAMS & SONS.

Evidence—Action for Infringement of Copyright in Picture—Production of Original Picture, whether necessary.

In an action claiming damages under s. 11 of the Art Copyright Act, 1862 (25 & 26 Vict. c. 68), for the infringement of copyright in a picture, the plaintiff did not produce the original picture, but gave evidence that he had seen it, and that a photograph sold by the defendants, which he produced, was directly taken from an engraving which was an exact copy of the original picture, and he produced the engraving:—

Held, that this evidence was admissible to prove the infringement, and was evidence for the jury that the photograph sold by the defendants was a copy of the original picture.

APPEAL from the judgment of Collins, J., at the trial, with a jury, at the Guildhall, London, of an action for infringement of copyright in a picture.

(1) 7 C. B. (N.S.) 99; 29 L. J. (C.P.) 1.

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LUCAS v. WILLIAMS & SONS.

The plaintiff, as registered proprietor of the copyright in a painting by Marcus Stone, R.A., called "The Peacemaker," claimed (inter alia) damages, under s. 11 of the Art Copyright Act, 1862 (25 & 26 Vict. c. 68), by reason of the defendants' having sold, published, exhibited, and distributed, or offered for sale, publication, exhibition, or distribution, copies of the painting made without the plaintiff's consent, and an injunction to restrain the defendants from further infringing his copyright therein.

At the trial the following evidence in support of the plaintiff's case was given: It was proved that a photograph of the picture called "The Peacemaker" was sold by the defendants, who were furniture dealers carrying on business at Wimbledon, at their shop. At the time the photograph was sold a card was attached, with the words "Painted by Marcus Stone, R.A.," upon it. The plaintiff did not produce the original painting by Mr. Marcus Stone, but he produced an engraving of it belonging to himself, which he said was made by a well-known engraver under Mr. Marcus Stone's immediate supervision, and was an exact copy of the original painting. He also produced the photograph sold by the defendants, and said that it was a bad photograph taken direct from the engraving. He also said that he knew the original painting of "The Peacemaker," which was formerly in his possession, and had never been out of it until it went to Australia.

Objection was taken by the defendants' counsel to the admissibility of this evidence, and Collins, J., ruled that it was admissible. At the end of the plaintiff's case, the defendants' counsel submitted that the original painting, "The Peacemaker," not having been produced, there was no evidence for the jury that the photograph sold by the defendants was a copy of it. Collins, J., left the case to the jury, who found a verdict for the plaintiff, with nominal damages. The learned judge gave judgment for the plaintiff with costs, and granted an injunction.

The defendants appealed.

Mallinson, for the appellants. The original painting not having been produced at the trial, there was no evidence that

the photograph sold by the defendants was a copy, and therefore no evidence of any infringement of the plaintiff's copyright. It appeared that the original was in existence, and no evidence to explain its absence was given. The best evidence was not given, because the jury had no opportunity of comparing the alleged copy with the original. The evidence which was given was secondary evidence, and ought not to have been admitted in the absence of any explanation to account for the original not having been produced. In *Boosey* v. *Davidson* (1), which was an action for infringement of copyright in musical compositions, it was held that a witness, called for the purpose of proving that a musical composition was not first published in England, could not be asked whether he had not seen printed copies of it for sale in Milan sixteen years before the trial. The question was said to be inadmissible as referring to the contents of a document not produced or accounted for. The same principle, it is submitted, applies to a painting. In *Rex* v. *Hunt* (2), which was an indictment for conspiring to hold an unlawful and seditious meeting, parol evidence of inscriptions on banners carried by the defendants was held admissible without producing the banners, but only on the ground that the inscriptions were the public expression of the opinions of those who bore the banners, and had rather the character of speeches than of writings.

Scrutton, for the respondent, was not heard.

LORD ESHER, M.R. In this case there is only one point of any importance. It was urged by the defendants' counsel that there was no evidence for the jury of an infringement of the plaintiff's copyright because the original picture was not produced. The question is, whether in an action for infringement of copyright, where the issue is whether or not that which the defendant has sold is a copy of the picture in respect of which the artist who painted it has copyright, it is necessary to produce the original. Here the picture which the defendants sold was produced, and the issue was, Is it an imitation of the picture which Mr. Marcus Stone painted? It is said that you cannot prove that the picture which the defendants sold was such an

(1) 13 Q. B. 257. (2) 3 B. & A. 575.

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imitation without producing the original picture. That you may produce the original picture, and put it and the alleged copy before the jury, and ask them to use their own eyes and come to a conclusion whether the picture sold is a copy of the original picture or not, is undoubted. In actions for the piracy of trade-marks, it is the constant practice to produce the plaintiff's trade-mark and the mark which is said to be an imitation of it, and ask the judge or jury to compare the two, and see whether the one is not an imitation of the other. To produce the original picture and the alleged copy, so that the jury may compare the two, may be the most satisfactory evidence of imitation, but it does not follow that it is the only evidence of it which can be given, nor does it follow that the evidence which was given in this case is only secondary evidence. "Primary" and "secondary" evidence mean this: primary evidence is evidence which the law requires to be given first; secondary evidence is evidence which may be given in the absence of the better evidence which the law requires to be given first, when a proper explanation is given of the absence of that better evidence. Take the case of proof of a man's handwriting: a witness is called who says, "I have seen A. B. write, and I know his handwriting. The document produced I declare is in his handwriting, because the writing in it is exactly like his." That kind of evidence is given every day. What difference is there in principle between a man's handwriting and a picture which he paints? The witness says, "Looking at the picture which the defendants sold, I say it is exactly like Mr. Marcus Stone's picture." When he is asked, "How do you know that?" he answers, "Because I have seen Mr. Marcus Stone's picture." That is not secondary evidence, but original evidence. Different kinds of evidence may be used to prove the same fact, and this is another way of proving the fact that the picture which the defendants sold is a copy of the original picture in respect of which there is copyright. If the jury were not satisfied, it would be open to them to say, "You could have produced better evidence; you have not produced the original picture; we will not act upon this evidence, though it is legal evidence." There is another question which may arise some day. Suppose neither the alleged copy nor the

original picture were produced. It is not necessary to decide the point, and I do not decide it; but I am not prepared to say that the infringement could not be proved by calling a witness to say that he knew the original picture, and had seen the picture which was alleged to be a copy of it, and they were both exactly alike. In the same way, where it is necessary to prove that a man was at a particular place on a given day, you call a witness to say that he knows A. B., and that the man he saw at such a place on such a day was A. B. That evidence is enough without producing A. B. There was more proof in the present case, because on one of the pictures sold by the defendants were the words "Painted by Marcus Stone, R.A.," which is some evidence of an admission by the defendants that the picture which they sold was a copy of the picture painted by that artist. In either view, therefore, I am clearly of opinion that there was evidence for the jury that the picture which the defendants sold was a copy of the original picture in respect of which the plaintiff had copyright.

Lord Esher, M.R.

FRY, L.J. I am of the same opinion. I take the same view as the Master of the Rolls with respect to the question of evidence, which is the only question of importance here. I think that the habitual practice of the Courts as to proof of handwriting should be applied. There was evidence for the jury that the picture sold by the defendants was a copy of the original picture in which the plaintiff had copyright.

LOPES, L.J. I am of the same opinion. I do not think it was necessary for the plaintiff to produce the original picture. In an action for infringement of copyright you may, in my opinion, call witnesses to say that they know the original picture, and know it well, and that the imitation is exactly like the original. Such evidence is clearly admissible. It is not secondary evidence, though perhaps not so satisfactory as the production of the original would be; but that is an objection going merely to the value of the evidence, not to its admissibility.

Appeal dismissed.

Solicitor for appellants: *W. G. S. Smith.*

Solicitor for the respondent: *Herbert Brentwick.*

W. A.

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Feb. 16;
May 14.

THE OVERSEERS OF NORWOOD *v.* SALTER.

Poor-rate—Tenements of Limited Value—Power to Rate Owner instead of Occupier—Rise of Value above Statutory Limit—Poor Rate Assessment and Collection Act, 1869 (32 & 33 *Vict. c.* 41), *ss.* 3, 4.

The vestry of a parish are only entitled, under s. 4 of 32 & 33 Vict. c. 41, to order the owner of a hereditament to be rated to the poor-rate instead of the occupier so long as the rateable value of such hereditament does not exceed the limits specified by s. 3 of that Act.

CASE stated by justices.

Upon the hearing of a complaint against the respondent for non-payment of a poor-rate, the following facts appeared:—

Prior to May 13, 1889, the vestry of the parish of Norwood, by resolution pursuant to 32 & 33 Vict. c. 41, s. 4 (1), ordered that

(1) By 32 & 33 Vict. c. 41, s. 3: "In case the rateable value of any hereditament does not exceed" (elsewhere than in the metropolis and in the boroughs of Liverpool, Manchester, and Birmingham) "eight pounds, and the owner of the hereditament is willing to enter into an agreement in writing with the overseers to become liable to them for the poor-rates assessed in respect of such hereditament, for any term not being less than one year from the date of such agreement, and to pay the poor-rates whether the hereditament is occupied or not, the overseers may, subject nevertheless to the control of the vestry, agree with the owner to receive the rates from him, and to allow to him a commission not exceeding twenty-five per cent. on the amount thereof."

Sect. 4: "The vestry of any parish may from time to time order that the owners of all rateable hereditaments to which section three of this Act extends, situate within such parish, shall be rated to the poor-rate in respect of such rateable hereditaments, instead of the occupiers, on all rates made after the date of such order; an thereupon, and so long as such order shall be in force, the following enactments shall have effect:—

"(1.) The overseers shall rate the owners instead of the occupiers, and shall allow to them an abatement or deduction of fifteen per centum from the amount of the rate.

"(2.) If the owner of one or more such rateable hereditaments shall give notice to the overseers in writing that he is willing to be rated for any term not being less than one year in respect of all such rateable hereditaments of which he is the owner, whether the same be occupied or not, the overseers shall rate such owner accordingly, and allow to him a further abatement or deduction not exceeding fifteen per centum from the amount of the rate during the time he is so rated.

"(3.) The vestry may by resolution rescind any such order after a day to be fixed by them, such day being not less than six months after the passing of such resolution, but the order shall continue in force with respect to all rates made before the date on which the resolution takes effect."

the owners of all hereditaments in the parish of which the rateable value did not exceed 8*l.*, should be rated to the poor-rate in respect of such hereditaments, instead of the occupiers, on all rates thereafter made. Such order remained unrescinded at the date of the making of the poor-rate hereinafter mentioned. On May 13, 1889, one H. C. Hanson gave notice in writing, pursuant to the above-mentioned section, to the overseers of the parish for the time being, that he was the owner of the several hereditaments in the parish described in the schedule thereto, and that he was willing to be rated for a term of three years from that date in respect of all such hereditaments of which he was the owner, whether the same were occupied or not. The hereditaments described in the schedule consisted of forty-five specific cottages, one of which was No. 29, Randolph Road, Southall.

By an agreement in writing dated May 21, 1889, and reciting the said notice, the overseers agreed in consideration thereof to allow to H. C. Hanson an abatement of 25 per cent. from the amount of all poor-rates to which he should be rated in respect of the said hereditaments during the said term of three years. From the date of the making of that agreement down to September 26, 1890, the rateable value of the premises No. 29, Randolph Road, as shewn by the valuation lists for the time being in force in the parish of Norwood, was 8*l.* and no more. On September 26, 1890, a new valuation list was made and approved by the assessment committee of the Uxbridge Union (within which union the parish of Norwood is situate), and in such new valuation list the rateable value of No. 29, Randolph Road, was raised to 11*l.* 5*s.* No alteration had taken place with respect to the premises. Such new valuation was not appealed against, and while it was in force on August 17, 1891, a poor-rate was duly made for the parish of Norwood, and the respondent, who was the occupier of the premises 29, Randolph Road, was rated as such occupier. At the date of the making of such rate H. C. Hanson was still the owner of the premises. The respondent having refused to pay the rate, the overseers preferred a complaint before the justices. The justices were of opinion that the agreement of May 21, 1889, was still in force,

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notwithstanding the increase in the assessment of the premises, and that the owner, and not the occupier, was liable to be rated in respect of them. They accordingly dismissed the complaint, subject to a case setting out the above facts.

Poland, Q.C. (*Macmorran*, with him), for the overseers. The question turns upon the language of the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), for apart from that statute it is clear that the only person who can be rated to the poor-rate is the occupier. By s. 4 the vestry may order that the owners of all rateable hereditaments not exceeding 8*l.* in value shall be rated to the poor-rate instead of the occupiers; and upon such order being made, by sub-s. 2 the owner of one or more such hereditaments—that is, hereditaments belonging to the above-mentioned class—may enter into an agreement to be rated "in respect of all such rateable hereditaments of which he is the owner," whether the same be occupied or not, and in consideration of such agreement is to be allowed a deduction. The agreement which the owner is entitled to make is not with reference to specific hereditaments, but with respect to all hereditaments fulfilling the two conditions: first, of coming within the class of hereditaments not exceeding 8*l.* in value; and, secondly, of belonging to him as owner. The agreement in the present case is expressed to relate to the specific hereditaments mentioned in the schedule, but as so framed it is ultrà vires. The words of the section "of which he is the owner" clearly cannot mean "of which he is the owner at the date of the agreement," for if they did they would be redundant; they must mean "of which he is the owner at the date of the particular rate made." Those words were intended to meet the case of the agreeing party on the one hand acquiring hereditaments of the class mentioned subsequently to the date of the agreement, in which case the agreement would apply to the new acquisitions; and, on the other hand, selling some of the hereditaments of which he was the owner at the date of the agreement, in which case he would cease to be rateable in respect of them. But if non-compliance with the second condition at any time subsequent to the date of the agreement will take hereditaments

out of the operation of the agreement, non-compliance with the first condition at any time subsequent to the date of the agreement must also take them out of its operation.

This is the only construction of the section which is consistent with the provisions as to the general duties of overseers laid down in the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103). By s. 14 of that Act, the overseers of each parish in the union are in every year to "make a list of all the rateable hereditaments in such parish"; and, by s. 28, upon such valuation list being approved by the assessment committee, "no rate for the relief of the poor shall be of any force unless the hereditaments included in such rate be rated according to the annual value thereof appearing in the valuation list." Here the premises in question appear, and it is admitted appear correctly, in the valuation list as of the value of 11*l.* 5*s.* Therefore the overseers are bound to rate them at 11*l.* 5*s.*; but, if so, then they are bound to rate the occupier in respect of them, and not the owner. If they were to rate the premises at 8*l.*, the rate would, by virtue of the above section, be of no force at all.

C. Plumptre, for the respondent. The overseers, in making the agreement with respect to the specific hereditaments mentioned in the schedule, were acting within their powers. There is nothing in the Act of 1869 to shew that an increase in the value of the hereditaments to an amount above 8*l.* will put an end to the agreement.

If the appellants' contention is correct, great hardship might result. Suppose an agreement by the owner to be rated for five years in respect of premises whether occupied or not, and suppose that for the first two years the premises were unoccupied, and subsequently after they were let they rose in value above 8*l.*, the overseers, having had the advantage of the agreement so long as it was beneficial to them, might repudiate it upon its ceasing to be beneficial. Again, if the premises were let to a tenant by the owner during the currency of an agreement with the overseers under s. 4, sub-s. 2, the tenant would naturally covenant to pay a higher rent than he otherwise would do in consideration of his not having to pay the rates; and it would under those circumstances be unjust to the tenant if, upon

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a slight rise in the value of the premises, the burden of the rates were shifted from the owner to himself. Where, under sub-s. 3, the vestry rescind their order for the rating of the owners in lieu of the occupiers, the effect of such rescission is not to put an end to any existing agreement, but merely to prevent the making of any future agreements. But even if such a rescission of the order would put an end to existing agreements, no resolution to rescind the order has been made here. The contention of the appellants requires that the Court should, after the words "the overseers shall rate such owner accordingly" in s. 4, sub-s. 2, read in the words "so long as hereditaments continue of a value not exceeding 8*l.*"

Poland, in reply.

Cur. adv. vult.

HAWKINS, J., read the following judgment. On August 17, 1891, in a poor-rate made for the precinct of Norwood, in the Uxbridge Union, in the county of Middlesex, the respondent (Mr. Salter) being the occupier of a house No. 29 Randolph Road, Southall, within the said precinct, was rated in respect of that house, upon a rateable value of 11*l.* 5*s.*, in the sum of 1*l.* 19*s.* This sum he declined to pay, upon the ground that the owner of the house (a Mr. Hanson), and not the occupier, ought to have been rated in pursuance of an order of the vestry and of a notice by the owner made in pursuance of s. 4 of 32 & 33 Vict. c. 41.

Upon application made to justices for a distress warrant to enforce payment, they adopted the view of the respondent, and refused to issue such process. Hence the present appeal.

By an order of the vestry of the said precinct made before the events after mentioned, it was duly ordered that in all future rates the owners of all rateable hereditaments within the said precinct to which the 3rd section of the said Act extends, should be rated to the poor-rate in respect of such rateable hereditaments, instead of the occupiers. On May 13, 1889, Hanson, the owner of the said house, and also of forty-four other houses situate within the said precinct the rateable value of each of which was then not exceeding 8*l.*, gave to the overseers of the

precinct notice in writing that he was willing to be rated for a term of three years, commencing from that day, in respect of all such rateable hereditaments of which he was the owner, whether the same be occupied or not.

Afterwards, on May 21, by writing, the said churchwardens and overseers agreed to allow to Hanson an abatement or deduction of 25 per centum from the amount of all poor-rates to which he should be rated in respect of the said hereditaments during the term of three years.

From the date of the notices and agreement until September 26, 1890, the rateable value of No. 29, Randolph Road, as shewn by the valuation list, was 8*l.* and no more. On the last-mentioned day, however, a new valuation list was approved by the assessment committee of the Uxbridge Union, and in such new valuation list the rateable value of the house was raised to 11*l.* 5*s.* No structural alterations had taken place with regard to the premises.

By the poor-rate made on May 17, 1891, the respondent, Salter, was rated as the occupier of the said premises upon the said increased rateable value of 11*l.* 5*s.* Upon this state of things, the question we are asked to determine is, whether, notwithstanding the increase in the rateable value from 8*l.* to 11*l.* 5*s.*, the owner, and not the occupier, ought to have been rated.

I am of opinion that the occupier was properly assessed in the rate in question, and that this appeal ought therefore to be allowed. By the express words of the statute 43 Eliz. c. 2, s. 1, the actual occupier of premises is primâ facie the person to be rated to the poor-rate, and this liability can at the present day only be shifted upon the owner in the mode pointed out in s. 4 of the statute 32 & 33 Vict. c. 41 (commonly called the Poor Rate Assessment and Collection Act, 1869), and then only in respect of houses of limited rateable value as mentioned in s. 3.

Upon the true construction of the 3rd and 4th sections of this Act the decision in this case must depend. Before discussing them it will be useful to call attention to s. 19 of what was commonly called Sturges Bourne's Act (59 Geo. 3, c. 12), which was an enactment having in view objects very similar to those for which s. 4 of 32 & 33 Vict. was enacted, and the recital of

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s. 19 very clearly sets out the reasons for that enactment. It is as follows: "In many parishes, and more especially in large and populous towns, the payment of the poor's rates is greatly evaded, by reason that great numbers of houses within such parishes are let out in lodgings, or in separate apartments, or for short terms, or are let to tenants who quit their residences or become insolvent before the rates charged on them can be collected; and it hath been found that in many instances the persons letting such houses do actually charge and receive much higher rents for the same, upon the ground and expectation that the occupiers thereof cannot be effectually assessed to the poor's rates, and will not be charged with or required to pay such rates, and do thus obtain an undue advantage to themselves, and by means of the premises the other inhabitants of such parishes are unjustly compelled to pay much more than their fair and due proportions of the charges of relieving and maintaining the poor."

The section then goes on to enact that the inhabitants in vestry may resolve and direct that the owners of houses which shall be let at rents not exceeding 20*l.* nor less than 6*l.*, &c., &c., shall be assessed to the poor-rates instead of the occupiers, and it gives power from time to time to renew and vary such resolutions and directions, so as no such resolutions or directions shall extend to assess the owner of any house which shall be let at more than 20*l.* or less than 6*l.* It further provides that in assessing owners, reasonable deductions may be made from the rental upon which the assessment was made, not exceeding one-half. This enactment clearly shews the intention of the legislature that the operation of that section should be always confined to houses of the limited value therein mentioned.

The 4th section of the statute now under consideration is substantially a mere substitution for the 19th section of Sturges Bourne's Act, and although, owing to changes in the mode of rating to the poor-rate, couched in somewhat different language, the same principle applies to its construction. Each of the ss. 3 and 4 of 32 & 33 Vict. c. 41, has a separate object in view. As regards the 3rd section, it does not in the least alter the mode of rating. It has for its object merely the legalization of agreements for terms not less than one year between the owners

of small houses of limited rateable value and the overseers for the payment by the owner of the poor-rates assessed upon the occupier of such tenements, and whether the houses are occupied or not; and as a consideration for the owner agreeing to take upon himself such liabilities (to which the law did not subject him), the overseers have power conferred upon them to allow the owner a commission not exceeding 25 per cent. on the amount payable by him. Such agreements clearly required legislative sanction, for no discount or commission could otherwise have been allowed off the sum payable without leaving the conduct of the overseers open to grave objection. There is no compulsion on either owner or overseer to enter into any agreement at all, nor is there any obligation upon either to make a contract with reference to all, or to more than such one or more, of the owner's houses (being of the limited rateable value) as the owner and the overseers may agree upon; and with reference to the term during which the agreement shall subsist, though it may not be for less than a year, it may be for any number of years without any limit. As regards s. 4, it empowers the vestry to order that the owners of all rateable hereditaments to which s. 3 extends, shall be rated to the poor-rates instead of the occupiers, irrespective of any agreement. It reads as follows: "The vestry of any parish may from time to time order that the owners of all rateable hereditaments to which s. 3 extends, situate within such parish, shall be rated to the poor-rate in respect of such rateable hereditaments, instead of the occupiers, on all rates made after the date of such order"; and so long as such order shall be in force, it is by sub-s. 1 enacted that "the overseers shall rate the owners instead of the occupiers, and shall allow to them an abatement or deduction of 15 per cent. from the amount of the rate." Then comes sub-s. 2, which enacts that "if (i.e. during the time such order is in force) the owner of one or more such rateable hereditaments shall give notice to the overseers in writing that he is willing to be rated for any term not being less than one year in respect of all such rateable hereditaments of which he is the owner, whether the same be occupied or not, the overseers shall rate such owner accordingly, and allow to him a further abatement or deduction not exceeding 15 per

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centum from the amount of the rate during the time he is so rated."

The 3rd sub-section empowers the vestry, by resolution, to rescind any such order in manner and subject as therein stated. The effect of the provisions of s. 4 may be shortly stated thus: Of their own authority, irrespective of any agreement, the vestry may order that the owners of all houses to which s. 3 extends, shall be rated, instead of the occupiers; and as a consideration for imposing upon such owners the liability to pay the rates of occupiers who possibly might be unable or unwilling to pay for themselves, such owners are to be allowed a discount of 15 per cent. It may be that with this, many owners would be content; but for those who might not be so, the enactment provides that if any owner gives notice in writing that he is willing to be rated for one whole year in respect of all such rateable hereditaments of which he is owner, whether such tenements are occupied or not, he is entitled to a further abatement or deduction, to indemnify him against the risk of having to pay rates for houses for which he gets no rent, because they are unoccupied. In no other way can the notice affect him. The power compulsorily to rate owners of occupied houses rests on the earlier portion of s. 4. Sub-sect. 2 relates only to the rating of unoccupied premises. Let me suppose now the vestry to have made such an order for an indefinite period, and the owner not to desire to take upon himself the further obligation to pay for unoccupied houses, how ought the overseers to proceed to make their rate?

Of course, so long as the rateable value of each house does not exceed 8*l.*, no difficulty could arise; but if, as in the present case, the rateable value of all, any, or either of the houses within the operation of the order of vestry should since the date of such order have risen, and it should so appear in the valuation list, to an amount exceeding the sum of 8*l.*, the overseers would be bound in all further rates to assess such houses or house upon the increased annual rateable value appearing in the valuation list then in force, and in default of their doing so, the rate itself would not be of any force: see s. 28 of 25 & 26 Vict. c. 103 (the Union Assessment Committee Act). But in such circumstances, who is the proper person to be assessed, the owner or the occupier of

the hereditaments? This is the question we have to solve. All depends on the meaning of the words "all rateable hereditaments to which s. 3 of this Act extends," for such hereditaments only can be made the subject of the order of vestry. This renders it necessary to consider carefully the language of the 3rd section, bearing in mind always the obvious intention of the legislature in using it.

I think it may fairly be assumed that the legislature, in referring to s. 3 for a definition of the class of hereditaments respecting which an order of the vestry under s. 4 might be made, did so intending that the language of the 3rd section should define such hereditaments, and I think it has done so. The 3rd section begins by saying, "In case the rateable value of any hereditaments" (elsewhere than in the metropolis, Liverpool, Manchester, and Birmingham) "does not exceed 8*l.*, and the owner of such hereditaments is willing to enter into an agreement in writing with the overseers to become liable to them for the poor-rates assessed in respect of such hereditaments, for any time not being less than one year from the date of such agreement, and to pay the poor-rates whether the hereditaments are occupied or not, the overseers may, subject nevertheless to the control of the vestry, agree with the owner to receive the rates from him, and to allow him a commission not exceeding 25 per cent. on the amount thereof."

The contention of the respondent is, that to give validity to an agreement under s. 3, for however long a term, all that is necessary is that the rateable value of the house or houses in respect of which it is made shall at the date of the agreement not exceed the sum of 8*l.*, and that even though such house or houses immediately after the making of the agreement should rise to a rateable value very far exceeding 8*l.*, they remain still within the operation of the agreement for the full term for which it is made, and that in respect of all moneys payable by way of poor-rates on such increased rateable value, a commission of 25 per cent. may be allowed. This cannot have been intended nor within the contemplation of the legislature, and there is, in my opinion, nothing in the language of s. 3 to warrant such a contention. The framers of s. 3 obviously intended to deal, as

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Sturges Bourne's Act did, with small tenements only, and to make no change in the mode of rating other than such small hereditaments as would be occupied by the poorer class of persons, among whom many might be found unable or unwilling to pay the rates assessed upon them, and from whom it would be difficult to enforce payment, and many of which not unfrequently would be tenantless and unoccupied. These are houses in respect of which it is to the advantage of both overseers and owners to make such agreements or orders, on the one hand securing payment to the overseers, on the other securing a discount to the owners. But there is not a trace of any intention to interfere with the mode of rating, or of obtaining payment of rates in respect of houses of a higher class, occupied probably by a different class of tenants. In my opinion, the true and reasonable view to take of the 3rd section is that it permits such agreements to be made in respect of any house or houses so long as it or they do not exceed the limited rateable value, but no others; and that agreements under s. 3 should be construed as having application to the hereditaments mentioned in them only so long as such hereditaments continue of a rateable value not exceeding the limited amount of 8*l.* I think the language of the 3rd section supports this view; it reads thus: "In case the rateable value of any hereditaments does not exceed 8*l.*, the owner and the overseers may agree for the payment by the owner of the poor-rates in respect of such hereditaments"—treating the words "such hereditaments" as meaning such hereditaments as is before mentioned—i.e. hereditaments not exceeding the limited rateable value; treating that limited value as part of the description of the hereditaments contemplated. Or it may be read as authorizing the overseers to agree with the owner that he should pay the duty and receive a discount in case the hereditament rated is of a rateable value of not exceeding 8*l.*

I would further observe, if the respondent's contention is correct, it must go to this length, although it is essential to the validity of an agreement that at the moment it is signed the rateable value of the hereditaments should not exceed 8*l.*; the instant it has been signed, and however long the term of years for which it is to last, the rateable value, however much it may

have been increased, is absolutely immaterial, and this even though it was well known to both parties, when the agreement was entered into, that the hereditament was steadily increasing in rateable value, and that although such rise continued until the hereditament became of the rateable value of 25*l.*, or even much more, the overseers might insist upon the owner paying the rates, and the owner might insist upon his discount of 25 per cent. upon the amount payable. Practically this would amount to the same thing as an assessment at 25 per cent. below the rateable value, to the loss to the parish of the amount of such discount of 25 per cent. for the whole term of the agreement. The result would be that there would be gross inequality in rating between such hereditaments and all other rateable hereditaments in the parish; and if this were applied to 100 or 200 houses in the parish, the loss to the parish and the injustice to other ratepayers would be very substantial. Moreover, if an agreement, valid as to hereditaments of rateable value not exceeding 8*l.*, could be held to cover the rates payable during the term of the agreement—no matter to what extent the hereditaments might rise in value—it follows that a special term in the agreement that it should have that effect would be a legal stipulation.

This cannot have been the intention or in the contemplation of the legislature. To my mind, it is clear it was intended that ss. 3 and 4 should extend to small tenements of limited value only, as did s. 19 of Sturges Bourne's Act; and if it were intended otherwise, I cannot but think that some express indication of such intention would have appeared in those sections. Adopting the view I have taken of the operation of these sections—treating the commencing words of s. 3 as defining the extent to which the section extends—the duty of overseers under an order authorized by s. 4 is clear and simple: to assess the owner separately in respect of each house, so long as the rateable value of such house does not exceed 8*l.*; to assess the occupier, if the rateable value exceeds that amount. By so doing they will avoid apparent inconsistencies on the face of the rates, for the true rateable value must therein be stated; they will prevent all inequalities in the rate, other than those sanctioned by law in the case of

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small tenements; and will carry out the provisions of the enactment according to good sense and the intention of the legislature. This I think the overseers have done in the present case, and therefore I think this appeal should be allowed.

COLLINS, J. I am of the same opinion, though not, perhaps, quite on the same ground; and I may say that I have arrived with considerable doubt and hesitation at the judgment which I am now about to pronounce. I have, as I have said, felt very considerable doubt, for I am under a strong impression that the judgment which we are now pronouncing will upset well-established practice, and will differ from the opinion that has hitherto been the received opinion among persons charged with the duty of enforcing this Act.

The question before us is whether it is competent for the overseers and the owner, by an agreement purporting to be made under the 4th section of the Poor Rate Assessment Act, 1869, to agree that certain specific premises shall be subject to the provisions of that section, and that the owner, and not the occupier, of them shall continue to be rated during the term fixed by the agreement, notwithstanding that the rateable value of the premises in question has since the date of the agreement risen beyond the statutory limit of 8*l*.

There is an agreement in this case dealing with certain specific hereditaments, and purporting to give the owners of those hereditaments the benefits, and to impose upon them the burdens, contemplated by the 4th section; and, if the agreement in question is intra vires, then it binds the persons making the rates to rate the owner and not the occupier, and the decision of the justices was right. If, on the other hand, the agreement was not warranted by the section, then the occupier, and not the owner, was the proper person to be rated, and the decision of the justices was wrong.

It is quite clear that by the general law the occupier, and not the owner, is the person to be rated; and in order that the owner shall become the person to be rated, it is necessary for him to bring himself, in the circumstances of this case, within the 4th section, and the 4th section only.

Now, I have said that I have had considerable difficulty in arriving at my conclusion in this case, because it does seem to me that the 3rd section empowers the overseers and the owner to make an agreement which shall continue to bind certain specific hereditaments comprised in that agreement during the time contemplated by the agreement, irrespective of a rise in the rateable value of the hereditaments. It seems to me that the true construction of the 3rd section is, that it is competent to the owner even of one specific house, provided that at the time of the agreement it be within the statutory valuation mentioned in the 3rd section, to enter into an agreement as to that particular house for a term of not less than one year, and thereupon during that term he becomes liable by that agreement to pay the rates. The effect of such agreement is not necessarily to relieve the occupier where the premises are occupied. The occupier's name under this section continues to be in the rate-book, and the occupier continues to be liable; but, by the force of the agreement, the parish have the superadded liability of the owner. Under the agreement, he has rendered himself liable to pay the rates, not only of the premises that are occupied, but also of those that are not occupied, getting in return an equivalent abatement; but inasmuch as both parties are supposed to know what they mean, and to be able to consider the whole circumstances, it seems to me not unreasonable that it should be left to them to fix upon the period for which they are willing to make a contract in respect of any house.

That being my view of the 3rd section, I did feel that it would be anomalous—and I think it would be contrary to the practice—to treat the object attained, so far as it is attained by the agreement under the 4th section, as different. However, after a very careful examination of the section, and having had the advantage of a discussion with my brother Hawkins, I have come to the conclusion that the same result cannot be arrived at under the 4th section. I think that, when closely examined, it deals with a different set of circumstances, and arrives at a different result. The 3rd section rests, as I have said, wholly in agreement; and inasmuch as it contemplates dealing, not with all such houses as may be of a particular value, but with one particular tenement

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as to which it is competent for the parties to make an agreement for a fixed time, I think, as I have said, that the 3rd section allows that tenement to be governed during the agreed time by the agreement. But now I come to the 4th section, and I find a different set of provisions. The 4th section is compulsory. First of all it is compulsory upon the owner to be rated when the vestry of the parish have made an order which is ambulatory as to all rateable hereditaments of the class described in the 3rd section—that is, hereditaments, in this particular case, under the value of 8*l*. That order is one which applies only to such hereditaments as at the time of making the rate are below the prescribed value; and when it has been made, and so long as it continues in force, irrespectively of any agreement between the parties, the owner is liable to be rated, and the occupier cannot be rated. So far the section is compulsory upon the owners. Now comes the respect in which it becomes compulsory upon the overseers. By sub-s. 2 the owner may give notice to the overseers that he is willing to be rated for any term not being less than one year, in respect of all such rateable hereditaments of which he is the owner, whether the same be occupied or not; and when he gives that notice, there is no option left to the overseers at all. Thereupon the overseers, in the words of the section, "shall rate such owner accordingly" (there being so far no element of agreement at all), "and allow to him a further abatement or deduction not exceeding 15 per cent. from the amount of the rate during the time he is so rated." The words "not exceeding 15 per cent." may—I am not sure that they do, but they may—afford room for agreement between the parties to determine between them how much of the 15 per cent. is to be the extra commission allowed. I am not sure that even to that extent the element of agreement comes in, because on notice given by the owner it is compulsory upon the overseers to rate him accordingly; and it may very well be that it is left to the overseers, without any further assent on the part of the owner who has deliberately given this notice, to determine how much of the 15 per cent., in addition to the 15 per cent. to which he is already entitled under sub-s. 1, they will allow him. But whether it be so or not, it seems to me that at all events the only elements

which an agreement, if there be an agreement, under this section can deal with are, possibly, the length of the term—though I am not sure that that again is not absolutely compulsory upon the overseers—and, possibly, the amount of the extra abatement given in consideration of his assenting to be rated, whether the premises are occupied or not. If there be any agreement contemplated under this section at all, it must be limited simply to those particular points. This section does not contemplate any agreement by which the owner can confer upon the rating authority the right to rate him. That is conferred already by the earlier part of the section, and by virtue of the order made under it. The only scope for the agreement is as to determining, possibly, the length of the term and, possibly, the quantum of the 15 per cent. which is to be the extra commission allowed in consideration of his assent to be rated in respect of the premises, whether they are occupied or not.

That provision of sub-s. 2 is followed by another, which, I think, throws considerable light upon the meaning of the section: "The vestry may, by resolution, rescind any such order after a day to be fixed by them, such day being not less than six months after the passing of such resolution; but the order shall continue in force with respect to all rates made before the date on which the resolution takes effect."

Now, what would be the effect of such a resolution rescinding an order made under s. 4? If the contention of the respondents in this case is sound, they must contend that for so long as the term lasts provided by the agreement, the obligation to rate the owner and to pay him the deduction still subsists; and it seems to me that they must so contend, even though the order which gave the right and imposed the obligation to rate the owner has ceased to exist. It seems to me that that contention cannot be supported. It cannot be said that by agreement the parties have acquired a right to treat these particular hereditaments as subject to an order, which order itself no longer exists.

Having once got to that point, we have to see whether, in the particular circumstances of this case, the order was effective. Now, the order may cease to be effective in one of two ways: either by being rescinded in the manner pointed out by the 3rd

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section, or, automatically, by ceasing to apply to the particular house in question; and inasmuch as the order, as I have said, is an ambulatory order—that is to say, is a general order applying to all such houses as shall be of the statutory description, that is, in the case in question, under the value of 8*l.*—it is obvious that the order can have no efficacy as to any house that is not, at the time of making the rate, below the value of 8*l.* Therefore, in this particular case, apart from any resolution to rescind—and no such resolution has been passed—there was at the time of the making of this rate no order justifying the overseers in rating the owner of these premises; and, therefore, it had to be contended that the right to do that rested upon some agreement.

For the reasons I have given, I cannot find in the 4th section any power to make such an agreement giving the right to rate the owner where there is no order in force empowering the overseers to rate the owner of the particular hereditaments in question. On these grounds I agree with the judgment which has been given by my brother Hawkins that this appeal must be allowed.

Appeal allowed.

Solicitors for appellants: *Houlder & Court.*
Solicitor for respondent: *A. L. Houlder.*

J. F. C.

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May 7.

HOPE *v.* WARBURTON.

Licensing Acts—Offences—Permitting Drunkenness on Premises—Licensing Act, 1872 (35 *&* 36 *Vict. c.* 94), *s.* 13.

It is not necessary, in order to constitute the offence of permitting drunkenness on licensed premises within the meaning of s. 13 of the Licensing Act, 1872, to shew that a drunken person was served with drink on the premises.

CASE stated by justices.

An information had been preferred by the appellant, a superintendent of police, against the respondent, an innkeeper, charging that he, being a licensed person for the sale of intoxicating liquors by retail in his house and premises, did unlawfully permit drunkenness to take place on his licensed premises. From the evidence it appeared that on an inspector of police

visiting the respondent's premises he found two brothers, named David and James Douglas, standing at the counter, each drinking out of a pint pot. David Douglas was drunk, but said to the inspector that he had not been served with any drink there. There was no one serving behind the bar at the time that the inspector entered; but the inspector, on passing into the house, found the respondent's son, who was apparently in charge of the premises, and who said to the inspector in reply to his remarks, "I did not serve him with anything. I saw that he was drunk when he came in, and I did not serve him." There was no affirmative evidence that David Douglas, who pleaded guilty to a charge of being found drunk on licensed premises, was supplied with liquor on the respondent's premises.

It was contended on behalf of the defendant, that although David Douglas was drunk when he went upon the respondent's premises and was found drinking there, yet, as no evidence had been given that he was actually supplied with drink there, the defendant had not committed the offence of permitting drunkenness to take place on his licensed premises within the meaning of 35 & 36 Vict. c. 94, s. 13. The justices acceded to this contention, and dismissed the information.

The question for the opinion of the Court was whether the respondent did, by reason of the facts proved, permit drunkenness to take place on his licensed premises within the meaning of the above-named section.

J. Paterson, for the appellant. It is not necessary to the offence of permitting drunkenness on licensed premises that the drunken man should be supplied with liquor on the premises; selling liquor to a drunken man is a separate offence, and is dealt with by the same section. Sect. 18 expressly authorizes the ejection of a drunken man.

Mattinson, for the respondent. It cannot be successfully contended that there must be an actual sale of liquor to a drunken man in order to constitute the offence of permitting drunkenness under s. 13. But the facts stated in the case do not necessitate a conviction. The question is not whether there was evidence on which the respondent could have been convicted,

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but whether on the evidence he must, as a matter of law, have been convicted.

PER CURIAM (Day and Charles, JJ.). It is evident that the decision of the justices proceeded on the ground that an actual sale was necessary to constitute the offence of permitting drunkenness. It is, however, perfectly clear that serving the man with drink is not material to the offence at all. The appeal must be allowed.

Judgment for the appellant.

Solicitors for appellant: *Wood & Wootton.*

Solicitors for respondent: *H. Nelson Paisley, for Paisley Workington.*

W. J. B.

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May 27, 28

THE QUEEN *v.* BRUCE AND THE GUARDIANS OF THE BRAMLEY UNION.

Lunatic—Maintenance—Pauper—Expenses of Maintenance in Asylum—Union in which Lunatic has acquired exemption from removal—Order for Payment—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *ss.* 287, 294.

A person who had acquired exemption from removal by residence in a certain union became insane, and was sent to a pauper lunatic asylum. Some months afterwards she was released on trial, and resided for about seven weeks with her relations in another union, when she got worse, and was again received into the asylum. At the time of her release her mental capacity was such that she was incapable of exercising any independent choice as to her residence. A magistrate's order was obtained ex parte, under ss. 287 and 294 of the Lunacy Act, 1890, directing payment by the union in which the lunatic had acquired exemption from removal of the expenses of her removal to the asylum and her maintenance there after she had been received into the asylum the second time.

On a rule for a certiorari to quash the order:—

Held, that the temporary absence of the lunatic from the union where she had acquired exemption from removal, when she was incapable of exercising any choice as to her residence, did not constitute such a break of residence as to put an end to her status of irremoveability, and the order was right;

Held, also, that the order was rightly made ex parte.

A RULE NISI had been obtained, at the instance of the guardians of the North Bierley Union, calling upon William Bruce, Esq., the stipendiary magistrate for the borough of Leeds, and the

guardians of the Bramley Union, to shew cause why a writ of certiorari should not issue to remove into the High Court an order of the magistrate, of November 6, 1891, whereby the guardians of the North Bierley Union were ordered to pay to the guardians of the Bramley Union the sum of 1*l.* 17*s.* in respect of the examination of Hannah Jackson, a pauper lunatic, the bringing of her before a justice of the peace, and of the removal of her to the West Riding Pauper Lunatic Asylum, and the further sum of 13*l.* 19*s.* for her maintenance in the asylum, and why the order should not be quashed on the grounds:—

(1.) That the magistrate had no jurisdiction to make an order under s. 294 of the Lunacy Act, 1890 (1), against the guardians of the North Bierley Union, inasmuch as the pauper lunatic was not exempt from removal to the parish of her settlement;

(2.) That the magistrate had no jurisdiction to make the order in the absence of proof of the service of a summons or notice upon the guardians of the North Bierley Union.

The facts were as follows:—

On March 18, 1890, the pauper, Hannah Jackson, who had resided as a domestic servant in the North Bierley Union for about eighteen months, and had thereby acquired a status of irremoveability (2), became insane, and was sent under a magistrate's order to the West Riding Pauper Lunatic Asylum. The guardians of the Bierley Union paid the expenses of her examination and removal, and of her maintenance in the asylum from the date of her admission until January 31, 1891. On January 31, 1891, Hannah Jackson was allowed to leave the asylum on trial, under 53 & 54 Vict. c. 5, s. 55, and went to reside with her

(1) 53 & 54 Vict. c. 5, s. 294: "All incidental expenses and expenses of maintenance of a lunatic removed to an institution for lunatics who would at the time of his removal have been exempt from removal to the parish of his settlement or the country of his birth by reason of some provision of the Poor Removal Act, 1846 (9 & 10 Vict. c. 66), as amended by subsequent Acts, shall be paid by the guardians of the union wherein the lunatic has acquired such exemption, and no order shall be made in respect of such lunatic under any provision contained in this or any other Act upon the guardians of the union in which the lunatic is settled while the above-mentioned expenses are to be paid and charged as herein provided."

(2) Under 9 & 10 Vict. c. 66, s. 1; 24 & 25 Vict. c. 55, s. 1; and 28 & 29 Vict. c. 79, s. 8.

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brother in the Bramley Union. On March 3, 1891, she was discharged from the asylum as recovered, and an entry of her discharge was made in the register of the asylum. On March 23, 1891, her condition having changed for the worse, she was again received into the asylum under a magistrate's order. The medical officer of the asylum, in giving evidence before the stipendiary magistrate, stated that when Hannah Jackson was discharged on January 31, 1891, "her mental capacity was such that she was incapable of exercising any independent choice as to her place of residence." The guardians of the North Bierley Union appealed to the borough sessions at Leeds against the stipendiary magistrate's order of November 6, 1891; but the recorder held that no appeal would lie. The rule for a certiorari was then applied for and obtained.

May 27. *Poland, Q.C.*, and *R. Cunningham Glen*, for the Bramley Union, shewed cause. It is clear that the lunatic had acquired exemption from removal in the North Bierley Union within the meaning of s. 294 of the Lunacy Act, 1890, by residence for eighteen months, and it is equally clear, from the evidence of the medical officer of the asylum, that her removal to her brother's house on January 31, 1891, when she was in such a state of mind as to be unable to exercise any will of her own, was not such a break of residence as to do away with the status of irremoveability which she had acquired: *Reg.* v. *Whitby Union* (1) is conclusive as to this point. The order, therefore, was properly made on the North Bierley Union: *Guardians of Leeds* v. *Guardians of Wakefield.* (2) The order was rightly made ex parte, in accordance with the invariable practice, and the fact that there is no right of appeal is immaterial: *Ex parte Monkleigh* (3); *Reg.* v. *Recorder of Northampton.* (4) The North Bierley guardians might have obtained an adjudication as to the lunatic's settlement under s. 289 of the Lunacy Act, 1890, or, if her settlement could not be ascertained, she might have been made chargeable to a borough or county under s. 290.

(1) Law Rep. 5 Q. B. 325.

(2) 7 E. & B. 258; 26 L. J. (M.C.) 37.

(3) 17 L. J. (M.C.) 76.

(4) 6 B. & S. 653; S.C. nom. *Kettering Union* v. *Northampton Lunatic Asylum*, 34 L. J. (M.C.) 198.

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E. Tindal Atkinson, Q.C. (*J. J. Wright,* with him), for the North Bierley Union, in support of the rule. If the contention on the other side is right, a union affected by such an order as this is without remedy, having no opportunity of appearing to oppose the making of the order, and no right of appeal. In *Ex parte Monkleigh* (1), it was held that an order might be made ex parte; but the decision was expressly founded on the existence of a right of appeal, whereas the section of the Act of 1890, which gives jurisdiction to make this order (s. 287), contains an express provision that "an order under this section shall not be subject to appeal." The order should be made on the union from which the pauper was sent to the asylum.

Cur. adv. vult.

May 28. WRIGHT, J. In this case an order was made ex parte by the stipendiary magistrate at Leeds, directing payment of the expenses of the maintenance of a pauper lunatic by the union in which the lunatic has acquired exemption from removal. A rule nisi has been obtained for a certiorari to bring up and quash that order, and the question which we have to decide on the argument of the rule is whether the magistrate's order is a good order. It was contended in support of the rule that the order was bad, because the order for payment of the expenses ought to be made on the union from which the pauper was sent, and because there are no means of questioning the order which has been made, and it was also argued that the order was bad on the ground that it was made without any notice having been given to the union charged by it. In the first place, it is to be observed that there is no substantial difference between the provisions of the Lunacy Act, 1890 (53 & 54 Vict. c. 5), as to this subject and the provisions of the Acts previously in force, on which the earlier cases were decided, except the provision in s. 287 of the Act of 1890, excluding an appeal, which was formerly only matter of judicial decision. Secondly, it is the well-settled practice that, although the union from which the lunatic is irremoveable may not be physically or geographically the union from which the lunatic is sent, yet, in law, it is treated as if it were the same. There is authority for

(1) 17 L. J. (M.C.) 76.

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this proposition in the case of *Guardians of Leeds* v. *Guardians of Wakefield*. (1) In that case the order was made under a section corresponding to s. 287 of the Act of 1890, on the union in which the pauper had acquired a status of irremoveability, although that union was physically another union than that from which the pauper was sent to the asylum. It is the settled practice that in making orders under the provisions which are now embodied in s. 287 the orders are made ex parte. If indeed it were quite clear that no method existed of questioning an order so made, I should be prepared to hold, notwithstanding the practice, that the order ought to be made on notice. We have been referred to the case of *Ex parte Monkleigh*. (2) There the same point was taken by the Court, but they held that the order could be made ex parte, the parish officers in that case having a remedy by appeal. Then, is any hardship likely to be produced by adopting a similar conclusion here? I can see none. The order is made on the union, not as the union in which the lunatic has acquired exemption from removal, but as the union from which the lunatic was sent. The guardians of the union affected by the order could get rid of the effect of the order by proceeding either under s. 289 or under s. 290. If they proceed under s. 289 and prove that the lunatic has a settlement in another union, and disprove the irremoveability of the lunatic from their own union, they can obtain an order adjudging the settlement to be in such other union and for payment of the expenses; or, if the settlement cannot be ascertained, they can proceed under s. 290, and cause the lunatic to be made chargeable to a borough or county. On these grounds, I am of opinion that the order made by the stipendiary magistrate was right, and that the rule which has been obtained to quash it ought to be discharged.

MATHEW, J., concurred.

Rule discharged.

Solicitors for the North Bierley Union: *Jaques & Co., for John Trewavas, Bradford.*

Solicitors for the Bramley Union: *Cooper, Thorowgood, & Tabor, for Bond, Barwick, & Peake, Leeds.*

(1) 7 E. & B. 258; 26 L. J. (M.C.) 37.

(2) 17 L. J. (M.C.) 76.

P. B. H.

[IN THE COURT OF APPEAL.]

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May 16.

THIN AND ANOTHER *v.* RICHARDS & CO.

Ship—Charterparty—Warranty of Seaworthiness—Voyage in Stages.

By a charterparty a ship was to proceed to Oran, and there load a part cargo of esparto, for delivery at Garston, with liberty to fill up with ore, or other dead weight cargo, for owner's benefit, and to call at any ports in any order. She loaded at Oran, and left with a supply of coal insufficient for a voyage thence to Garston. She called at Huelva, and was filled up with ore, but no further supply of coal was taken on board. After leaving Huelva, the ship went ashore, by reason of the insufficient supply of coal, and the cargo was lost. In an action for non-delivery of the esparto:—

Held, by Day, J., that the voyage was an entire voyage from Oran to Garston, and that, the warranty of seaworthiness at the commencement of that voyage having been broken, the plaintiffs were entitled to recover;

Held, by the Court of Appeal, that even if the voyage could be treated as one divided into stages, the warranty of seaworthiness, which attaches at the commencement of each stage, had been broken at Huelva, and the plaintiffs were entitled to recover.

APPEAL from a judgment of Day, J.

The plaintiffs sued for breach of contract by non-delivery of a cargo of esparto grass, shipped, under a bill of lading, at Oran for delivery at Garston. The plaintiffs were time charterers of the steamship *Westfalia*, under a charterparty, which contained the following clauses: "The ship being tight, staunch, and strong and every way fitted for the voyage, shall . . . . proceed to Oran . . . . , and there load from the charterers, or their agents, a part cargo (say 200 to 250 tons) of Broza (having liberty to fill up with ore or other dead weight cargo for owner's benefit) . . . . and being so loaded, shall therewith proceed to Garston dock, or so near thereto as she may safely get, and deliver the same agreeably to bills of lading. . . . Any act, neglect, or default whatever of pilot, master, or crew in the management or navigation of the ship, ... always mutually excepted. The vessel to have liberty to call at any ports in any order. . . ."

It is usual for a ship, partly loaded with esparto grass, a very light cargo, to call at a Spanish iron ore port and load with ore. The *Westfalia*, therefore, after loading esparto at Oran, proceeded to Huelva, and there filled with iron ore. At Oran she had some

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coal on board, and she loaded a further supply. At Huelva, the engineer reported, apparently erroneously, that there were eighty tons on board, a quantity sufficient for the voyage to Garston. After leaving Huelva, bad weather was encountered, the supply of coal ran short, and the ship was put back to endeavour to make a Spanish port. She went ashore, and was lost with her cargo.

The learned judge was of opinion, and it was not contested, that at Oran there were not enough coals on board for a voyage thence to Garston, and he held that, as between the plaintiffs and the defendants there was one entire voyage between those ports, and that there had been a breach of the contract for seaworthiness so far as that voyage was concerned, and he gave judgment for the plaintiffs.

The defendants appealed.

J. G. Barnes, Q.C., and *Hollams*, in support of the appeal. It is submitted that the judgment was wrong in saying that the ship was not seaworthy at Oran. The course of business in such cases is to call at other ports to fill up with a weighty cargo, and liberty to do so is given by the charterparty. All that was necessary at Oran was, that the ship should have enough coal to take her to the port at which she was to fill up, and when she arrived there a further supply should have been obtained. The fact that it was not obtained was due to the negligence of the engineer, who reported wrongly as to the amount on board. This negligence comes within the excepted perils. *Biccard* v. *Shepherd* (1) illustrates the principle of the division of a voyage into stages, and the need at the commencement of each stage for seaworthiness for that stage only. There may be no answer to the owners of the iron ore shipped at Huelva, but the plaintiffs cannot recover. Many of the eastern going steamers coal three or four times on their voyage, and it could hardly be suggested that at starting they are not seaworthy because they do not carry enough coal for the entire voyage, which would be impossible without destroying their capacity to carry cargo.

(1) 14 Moo. P. C. 471.

Bigham, Q.C., and *Arthur Russell*, for the plaintiffs. The learned judge rightly decided that this was the voyage from Oran to Garston. That was what the plaintiffs contemplated, and for that voyage the vessel was not seaworthy. Even if there was to be one voyage in two stages, there must be a warranty of seaworthiness over each stage.

J. G. Barnes, Q.C., in reply.

LORD ESHER, M.R. It seems to me that this case is governed by what Lord Wensleydale laid down in *Biccard* v. *Shepherd* (1), quoting his own judgment in *Dixon* v. *Sadler*. (2) If it is to be taken that this was a voyage from Oran to Garston, it is clear that the vessel should have been seaworthy when she left the former port and in a condition to bear all the ordinary vicissitudes of the voyage, among other things having on board a sufficiency of coal for the voyage under ordinary conditions. It is said on behalf of the defendants that it was a voyage divided into stages, the first of which was from Oran to Huelva. The ship had liberty to call at any ports in any order; it is clear that if she goes to any port she can take in more coal if required, and so it is said that from Oran to the port where she called was a first stage in her voyage. I doubt if this is correct, but if it is so, the case is brought within the language used by Lord Wensleydale. "If the voyage be such as to require a different complement of men, or state of equipment, in different parts of it, as if it was a voyage down a canal or river, and thence across to the open sea," in this case as if the voyage were from Oran to Huelva and thence to Garston, "it would be enough if the vessel were, at the commencement of each stage of the navigation, properly manned and equipped for it" (3), that is, properly equipped for that stage. If, therefore, the shipowner insists that Huelva to Garston is a stage of the voyage, he must see that the vessel is properly equipped at the commencement of that stage. Any question as to the state of the ship with regard to seaworthiness at Huelva would therefore not turn on neglect or default of the master or crew, but would depend on an absolute warranty. In

(1) 14 Moo. P. C. 471. (2) 5 M. & W. 405.

(3) *Dixon* v. *Sadler*, 5 M. & W. 405, at p. 414.

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either view of the voyage there has been a breach of warranty, and the appeal must be dismissed.

FRY, L.J. The voyage from Oran to Garston was either an undivided voyage or it was a voyage in stages. In the former case it would be necessary that the vessel should be seaworthy at Oran for the whole voyage. In the second case she must be seaworthy at the commencement of each stage and therefore seaworthy when she left Huelva. In either case the warranty of seaworthiness has been broken. It is just and right that the plaintiff should be entitled to recover, for the law imposes a warranty of seaworthiness for the entire voyage contemplated by the parties, and the shipowner ought not to be able to escape from this liability by dividing the voyage into stages. I differ from the learned judge in one particular, because it would appear that he thought the case of *Biccard* v. *Shepherd* (1), cited by the counsel for the defendants, was not material, whereas I think it was fatal to their case.

LOPES, L.J. I entirely agree.

Appeal dismissed.

Solicitors for the plaintiffs: *Waltons, Bubb, Johnson & Whatton.*
Solicitors for the defendants: *Hollams, Son & Coward.*

A. M.

C. A. 1892 *May* 19.

[IN THE COURT OF APPEAL.]

HEARSON *v.* CHURCHILL AND OTHERS.

Officer—Navy—Right to Resign Commission—Conditions of Service—Desertion—Naval Discipline Act, 1866 (29 & 30 *Vict. c.* 109), *ss.* 19, 87.

An engineer officer in the Royal Navy who has accepted a commission, and is borne on the books of a ship in commission, cannot resign without the consent of the Lords Commissioners of the Admiralty:—

Semble, under no circumstances is a naval officer entitled to resign his commission except by permission of Her Majesty.

APPEAL of the plaintiff from the judgment of Denman, J.

The action was brought to recover damages for illegal arrest and imprisonment. The plaintiff in the year 1884 was appointed

(1) 14 Moo. P. C. 471.

by the Commissioners for executing the office of Lord High Admiral of the United Kingdom an assistant engineer in Her Majesty's fleet, and in 1889 he was appointed engineer in the following terms: "To Mr. Hugh Reginald Hearson, hereby appointed engineer in Her Majesty's fleet. We do by virtue of the power and authority to us given hereby constitute and appoint you engineer in Her Majesty's fleet, authorizing and requiring you from time to time to repair on board and to take charge as engineer in any ship or vessel to which you may hereafter at any time be duly appointed, and you are properly to officiate in all things relative to the duty of your station, observing and executing the printed regulations and instructions relative to your department, and being obedient to such commands as you shall from time to time receive from your captain or other your superior officers. And for so doing this shall be your commission. Given, &c." On March 28, in the same year, the plaintiff received an appointment as follows: "To Mr. Hugh R. Hearson, hereby appointed additional engineer of Her Majesty's ship *Pembroke* for service in the *Mersey*. The Lords Commissioners of the Admiralty having appointed you additional engineer of Her Majesty's ship *Pembroke*, their lordships hereby direct you to repair on board the *Mersey* at Chatham and to report to me the day on which you shall have joined her." The *Mersey* was at Chatham fitting out, and not in commission, and the plaintiff went on board the *Pembroke* and reported that he had done so. The *Pembroke* had been a large line of battle ship, but she had been partly dismantled, and was moored at Chatham. She was one of three guardships of the steam reserve to which engineers and assistant engineers are required to be attached when the ships on which they have been employed are paid off. The plaintiff's name was duly entered on the books of the *Pembroke*, which was admittedly a ship in commission. Whilst on the ship the plaintiff was employed on the *Mersey*, and when she was put in commission the plaintiff was appointed to her on July, 1890, in these terms: "To Mr. Hugh R. Hearson, R.N. Hereby appointed engineer of Her Majesty's ship *Mersey*. The Lords Commissioners of the Admiralty having appointed you engineer of Her Majesty's ship *Mersey*, their lordships hereby

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direct you to repair on board that ship at Chatham." The plaintiff accordingly repaired on board and served on that ship until September in the same year, when she was paid off, and he returned to the *Pembroke*. In the meanwhile he had been offered an appointment in China, and he applied through the captain of the *Pembroke* to be allowed to go on half-pay for three years to accept that appointment. This request was refused by letter from the Admiralty of September 23, 1890, and on the same day the plaintiff wrote asking that his resignation might be accepted. On October 10 he obtained leave of absence, and it was not disputed that at that time he had no intention of returning to the *Pembroke*. Subsequently a letter was sent from the Admiralty to the captain of the *Pembroke*, dated October 13, declining to comply with the plaintiff's request to be allowed to resign his commission. On October 15 a letter was sent by the plaintiff to the captain of the *Pembroke* conveying a request that the Lords of the Admiralty would reconsider their decision in view of Art. 225a of the Queen's Regulations and Admiralty Instructions. That article is as follows: "Applications from officers to resign their commissions are to be made in accordance with the regulations as to correspondence laid down in Art. 1891 with the approval of the captain and with the certificate prescribed by Art. 542, and will be duly considered with reference to the urgency of each individual case and the exigencies of the service." On October 15 the plaintiff, fearing that any further delay would imperil his appointment in China, left England, and sailed for China by a French steamer. The Admiralty thereupon treated him as a deserter and, when he went ashore at Singapore, where the ship touched, he was arrested and sent back to England in custody. An application was made in the Queen's Bench Division for a writ of habeas corpus, and, on the argument of the rule, the plaintiff was discharged from custody on the ground that when he left the *Pembroke* he was not borne on the books of that ship within the 87th section of the Naval Discipline Act, 1866, which enacts: "Every person in or belonging to Her Majesty's Navy, and borne on the books of any one of Her Majesty's ships in commission, shall be subject to this Act." The plaintiff then commenced this action against the named

defendant and others responsible for his arrest and transmission in custody to England. The case was tried before Denman, J., and a jury, to whom the learned judge left the question whether on the evidence before them they found that the plaintiff was borne on the books of the *Pembroke* at the time that he left her on October 10, and the jury answered the question in the affirmative. After argument on further consideration the learned judge gave judgment for the defendants.

The plaintiff appealed.

Channell, Q.C., and *J. V. Austin* (with them *Waghorn*), in support of the appeal. There are two propositions in support of the plaintiff's case, first, that, when he left the *Pembroke* he was no longer an officer in Her Majesty's Navy, and second, that he was not at that time borne on the books of the *Pembroke*. As to the second point, he had been on the books of the *Pembroke*, but he became an officer of the *Mersey*, and ceased to belong to the former ship. The fact that he was not struck off the books of the *Pembroke*, but treated as lent to the *Mersey*, ought not to affect his position; and if he was improperly retained on these books and not re-entered on his return, he was not legally borne on the books of the *Pembroke* when he left her. Further, he had a right to resign. An officer in the navy actually serving an appointment may have no right to resign: *Reg.* v. *Cuming* (1); but when paid off from his ship there is nothing to prevent his resigning. There is no principle of law which says that a man must serve for life. The plaintiff made no contract to do so, and the acceptance of a commission is not such a contract. Regulation 1906 says: "Engineers and assistant engineers on relinquishment of their appointments at home or on return from foreign service are to be discharged to the guardship of the steam reserve they wish to join, without reference to the Admiralty." This contemplates some power on the part of the officer to relinquish his appointment; and if he can do that, it would seem that he must be able to quit the service. Even if it be admitted that an officer cannot resign under such circumstances as to defeat the object for which he is employed at the time, the question whether his

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resignation does defeat that object and whether his action in resigning was reasonable under the circumstances, is a question of fact to be determined by a jury and should have been left to the jury in this case: *Parker* v. *Lord Clive* (1); *Vertue* v. *Lord Clive.* (2) In this case the plaintiff was in the position of an officer on half pay, that is, he was not serving any appointment, but had exhausted the one on which he had been employed and had not accepted another.

Staveley Hill, Q.C., and *A. T. Lawrence* (with them, *Sir R. Webster, A.G.*), for the defendants, were not heard.

LORD ESHER, M.R. I shall not go into all the various propositions, some of which appear to me to be dangerous, brought forward in support of this application. The proposition we have to consider is whether a naval engineer who has accepted a commission in the Royal Navy, has been appointed to a ship, is borne on the books of that ship, and is in receipt of full pay as being on the books of that ship, is entitled, of his own free will, and without the consent of the Lords Commissioners of the Admiralty, to resign and leave the service. His commission is said to be on the footing of a contract, and two cases were cited of officers in the employment of the East India Company. They have nothing to do with this case, which depends not on service with a trading company, but upon the prerogative rights of the sovereign of the United Kingdom. Those rights, so far as they affect this case, are regulated by statute, and the question we have to consider is whether the plaintiff is brought by the facts of the case within s. 87 of the Naval Discipline Act, 1866. Can he say that he was not in or belonging to Her Majesty's Navy. It is clear that he was in the service up to the time he was struck off the books of the *Pembroke* as a deserter. Then we have seen the books, and it is idle to argue that he was not borne on the books of the *Pembroke.* The *Pembroke* was one of Her Majesty's ships and was in commission, and thus the plaintiff is brought in every particular within the section, at all events, up to the time when he sent in his request to be allowed to resign. The 19th section of the Act says: "Every person subject to this

(1) 4 Burr. 2419. (2) 4 Burr. 2472.

Act who shall absent himself from his ship, or from the place where his duty requires him to be, with an intention of not returning to such ship or place, or who shall at any time and under any circumstances when absent from his ship or place of duty, do any act which shews that he has an intention of not returning to such ship or place, shall be deemed to have deserted, and shall be punished accordingly." Now, what did the plaintiff do? He obtained leave of absence, and when he did so he had made up his mind to go altogether. Therefore he was a person who absented himself from his ship with an intention of not returning. He was, therefore, a deserter, unless he had a right to resign. The question of desertion can, under no circumstances, be made to depend on the finding of a jury as to whether it was a reasonable thing to do or not. It has been admitted that no case has laid down this proposition. In the case of *Reg.* v. *Cuming* (1), Lieutenant Hall may have assumed that position, but not successfully. The judgment in that case seems to indicate that in certain circumstances not clearly stated, some of the judges thought, but would not decide, that the acceptance of a commission did not necessarily bind the officer to enter upon any particular service. Therefore I think I am right in saying that in the whole course of the history of the navy, there is no case to shew that an officer can run away from his ship, and then take the opinion of a jury whether it was not a reasonable thing to do as he had an offer of better employment. The statement of the proposition seems to me to shew how indefensible it is. The only difficulty I feel in this case is that we must differ from the conclusion arrived at by the Divisional Court that set the plaintiff at liberty on his application for a habeas corpus, a decision which is inconsistent with our decision, and with which I cannot help saying I entirely disagree.

FRY, L.J. The question we have to consider in this case is whether, on October 10, 1890, when the plaintiff left the *Pembroke* with an intention not to return, he was in Her Majesty's navy, and borne on the books of that ship. In ascertaining whether he was a person affected by s. 87 of the Naval Discipline

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Act, 1866, the first question is, whether or no he was a person in or belonging to Her Majesty's navy. He had been in that position, and was still in it, unless he had the power to resign. What, then, are the terms of the commission? He was authorized and required, from time to time, to repair on board, and to take charge as engineer in any ship or vessel to which he might thereafter at any time be appointed. We are told that this means until he should think fit to resign, but that is not the language used. Whether or no it is possible for an officer who has accepted a commission at any time to throw it up at his own will and pleasure, I do not undertake to say. I doubt whether it is so, but I am content to leave that question open, for it is clear to me that an officer who accepts a commission, receives an appointment under it, is in full service and in receipt of full pay—all which events happened with regard to this man—cannot of his own will and pleasure resign his commission.

The proposition put forward on behalf of the plaintiff is that an officer may resign at any time, provided he does so under such circumstances as not to defeat the object of the mandate, and that the question whether his resignation does or does not defeat the object of the mandate is one to be tried by a civil tribunal, before which it may ultimately come.

I cannot imagine anything more inconvenient or detrimental to the service. For one thing, it would be impossible to determine whether at any moment he was or was not an officer in the service. He would remain in an ambiguous position until the reasonableness of his action might be determined by a jury. Such a position would be absolutely inconsistent with the maintenance of discipline, and I must, therefore, reject that proposition and come to the conclusion that in this case the plaintiff had no right to resign; whether he ever could have such a right is not for us now to decide.

The next point is whether the plaintiff was borne on the books of the *Pembroke*. We have seen the books, and it is clear that, in fact, he was. His name was actually re-entered after his return from serving on the *Mersey*. The doubt which influenced the Divisional Court is not to be justified when the books are looked at. But then arises the question whether he was law-

fully and rightly borne on the books of the *Pembroke*. I am of opinion that he was, and that the appointment to the *Pembroke* was intended to remain, except while the plaintiff was serving on the *Mersey*, and that the true effect of the appointment to the *Pembroke* and the *Mersey*, coupled with the regulations, was that the former revived when that service in the *Mersey* was over. The case satisfies all the conditions of the 87th section, and the decision of the learned judge must be upheld.

LOPES, L.J. The question is whether, on October 10, 1890, the plaintiff was in Her Majesty's navy, and borne on the books of one of Her Majesty's ships in commission. The second branch of this inquiry is too clear for argument. As to the first part of the question, he certainly belonged to Her Majesty's navy, unless he had the power of resigning without the consent of the Lords Commissioners of the Admiralty. I adopt what was said in *Reg.* v. *Cuming* (1), with this qualification, that I carry the principle further than that case seems to do. It appears to me, looking at the provisions of the Naval Discipline Act, 1866, that under no circumstances is a naval officer entitled to resign his commission except by permission of Her Majesty. Any other view would, in my opinion, be destructive of discipline and the efficiency of the service.

There is one other matter to which I think I ought to refer, and that is the decision of the Divisional Court on the application for a habeas corpus. I regret the decision which was then come to, with which I quite disagree.

LORD ESHER, M.R. I wish to say that, though we cannot bind any other Court by a decision, as the matter is not before us, that I myself am strongly of opinion that an officer who has accepted a commission in Her Majesty's navy cannot, under any circumstances whatever, resign without the consent of Her Majesty the Queen.

FRY, L.J. As the Master of the Rolls has said that, I may add that, although I reserved the point as not requiring

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decision now, the inclination of my opinion is in the same direction.

Appeal dismissed.

Solicitors for plaintiff: *Crowders & Vizard.*

Solicitors for defendants: *Hare & Co., for the Solicitor of the Treasury.*

A. M.

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Feb. 17, 18; *March* 26.

[IN THE COURT OF APPEAL.]

COMMISSIONERS OF INLAND REVENUE *v.* SCOTT.
IN RE BOOTHAM WARD STRAYS, YORK.

Revenue—Corporation Duty—Exemptions—Common—Allotment—Application "in manner prescribed by Act of Parliament"—"Charitable Purpose"—Customs and Inland Revenue Act, 1885 (48 & 49 *Vict. c.* 51), *s.* 11, *subss.* 2, 3.

The Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51), s. 11, after reciting that certain property, by reason of the same belonging to or being vested in bodies corporate or unincorporate, escapes liability to probate, legacy, or succession duties, and that it is expedient to impose a duty thereon by way of compensation to the revenue, imposes a duty upon the annual value of real and personal property vested in any body corporate or unincorporate, subject to the exemption of (2.) "property which, or the income or profits whereof, shall be legally appropriated and applied for the benefit of the public at large, or of any . . . borough or place, or the ratepayers or inhabitants thereof, or in any manner expressly prescribed by Act of Parliament"; (3.) "property which, or the income or profits whereof, shall be legally appropriated and applied . . . for any charitable purpose."

By a private inclosure Act in 1763, certain spaces of C. Common were allotted to the corporation of York, in trust for the freemen inhabitants of B. ward in that city, as compensation for previous rights of common.

In 1632, by agreement with the lord of the manor, the fourth part of the adjoining common of H., afterwards called the "Intack," was conveyed in fee to the Mayor of York, in satisfaction of the common rights of the freemen inhabitants of B. ward. The allotments of C. Common and the Intack had ever since been enjoyed by the freemen inhabitants of B. ward, and were under the control of pasture-masters, who, after paying the expenses of management, applied the profits of the whole to the benefit of poor freemen, and also for some years past for the benefit of their widows:—

Held (affirming the decision of Denman and Wills, JJ.), that the profits of the allotments which were applied under the Act of 1763 were exempt from corporation duty under sub-s. 2 of s. 11 of the Inland Revenue Act, 1885;

but that the profits of the Intack, not being appropriated and applied under any Act of Parliament, were not exempt under that sub-section.

Held, also, that the profits of the Intack were not within the exemption in sub-s. 3 as profits appropriated and applied "for any charitable purpose."

Reg. v. *Commissioners of Income Tax* (22 Q. B. D. 296; [1891] A. C. 531) followed.

The words "in manner expressly prescribed by Act of Parliament" in sub-s. 2 of s. 11 must be taken to refer to the object to which the profits are to be applied, not to the special methods by which such application is to be carried out.

CASE stated by consent in an action by the Commissioners of Inland Revenue against the "pasture-masters" of lands known as the Bootham Ward Strays, York, for the payment to the Commissioners of the duty assessed by the Commissioners in respect of such lands in pursuance of the Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51).

The section of the Act under which the assessment was made was s. 11, which imposes a duty of 5 per cent. upon the annual value, income, or profits of property belonging to or vested in bodies corporate or unincorporate, but subject to the following exemptions (among others):—

(2.) Property which, or the income or profits whereof, shall be legally appropriated and applied for the benefit of the public at large, or of any county, shire, borough, or place, or the ratepayers or inhabitants thereof, or in any manner expressly prescribed by Act of Parliament.

(3.) Property which, or the income or profits whereof, shall be legally appropriated and applied for any purpose connected with any religious persuasion, or for any charitable purpose, or for the promotion of education, literature, science, or the fine arts.

The facts stated in the special case were as follows:—

Prior to the year 1763 the freemen of the city of York had possessed rights of common over waste and inclosed land. In 1763, in pursuance of an agreement between the lord of the manor and various persons interested in the land, an Act was passed, under the provisions of which allotments known as the York Strays were made to the mayor and commonalty, in trust for the freemen of the several wards of the city, including Bootham Ward, to which the present case was confined. The Act provided that one share of the common so set out and

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allotted should "for ever thereafter be held and enjoyed by the freemen of the said city from time to time inhabiting in ancient messuages within Bootham Ward, in severalty, exclusive of all others, in lieu of such their right of common," &c. The Act also contained a provision that for the effectual repairing of a certain highway leading from York to and over Clifton Common, which was to be maintained by the mayor and commonalty in trust for the freemen, the commissioners should allot to the mayor and commonalty, in trust for the freemen inhabitants of Bootham Ward, a portion of the common which they should deem adequate to the charge of for ever keeping in repair such part of the highway as should be carried through the said freemen's allotment, and it provided as follows: "And the pasture-masters of Bootham Ward shall also demise and let the land so to be allotted from year to year for the best rent that can be got for the same, and apply such reut, or so much thereof as shall be needful, in the repairs of the highway." It was further provided that all right of common should be extinguished on the execution of the award of allotment.

By the award which was made on March 19, 1764, the Commissioners awarded to the mayor and commonalty of York, in trust for the freemen of the city from time to time inhabiting in ancient messuages within Bootham Ward, 91A. 0R. 18P., in compensation for their common rights. They also awarded 8A. 0R. 32P. to the intent and purpose that the pasture-masters of the Bootham Ward for the time being might, by and out of the rents and profits thereof, maintain and keep in repair so much of the public highway set out as should be carried through the allotments awarded to the mayor and commonalty in trust for such freemen as aforesaid in lieu of their common rights.

From time immemorial up to 1632, the freemen inhabiting in Bootham Ward had enjoyed certain common rights over another common adjoining Clifton Common, called Huntington Common, and the lord of the manor agreed with the mayor and commonalty to convey one-fourth of the soil then inclosed to the use of the mayor and commonalty, to be set out in severalty in satisfaction of the right claimed by the city in the common of Huntington. Sixty acres, now commonly known as the "Intack,"

were inclosed in accordance with that agreement, and (except as to part compulsorily taken by the North Eastern Railway Company) "the freemen inhabitants of Bootham Ward" have ever since 1632 enjoyed the exclusive pasturage of the Intack, and for many years past—and, as it is believed, from 1632—the allotment of 91A. 0R. 18P. and the Intack, has been held together "for the benefit of the freemen of Bootham Ward."

All freemen inhabiting in Bootham Ward had, prior to the Act, the right of common in Clifton, and after the passing of the Act and award these rights were transferred to the allotment of 91A. 0R. 18P., and were exercised under the control of the wardens and pasture-masters as theretofore at certain moderate fixed charges, and the rights of the aforesaid freemen over the Intack remained unaffected by the said Act and award. In and prior to 1836 each of the aforesaid freemen was entitled to a right of pasturage over the 91A. 0R. 18P. for three head of cattle, for 10*s.* for each cow, and 12*s.* for each horse; but at the present time the charges were determined annually by the pasture-masters, who did not increase the charge without the consent of the freemen, and in 1887 and 1888 the charges were —for every mare and foal 2*l.* 10*s.*, for every horse 2*l.* 5*s.*, and for every cow 1*l.* 10*s.*, with an additional 5*s.* for non-freemen.

Two tenements upon the Strays, built at unknown times, were let at annual rents of 16*l.* and 12*l.* respectively. Up to the year 1850 the payments made for repairs of the highway, wages, and other incidental expenses in connection with the Strays, appear to have absorbed the receipts. But in 1850, there being a balance in hand, a resolution was passed at a meeting of the freemen inhabiting Bootham Ward, held on January 1, 1850, "that such of the poor freemen and freemen's widows as should not exercise their rights of pasturage be paid 5*s.* each on or before July 5 next." Since that time similar resolutions have been passed and acted on, varying the amount payable according to the amount of the available income, the 5*s.* in some cases being raised to 25*s.* In 1888 a total sum of 300*l.* was paid to freemen and widows at the rate of 15*s.* each.

The annual balance of receipts over expenditure had of late years largely increased, owing partly to an increase in the rents

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of the lands let, partly to an increase in the charge for pasturage, and partly to the fact that a portion of the allotments and the Intack, valued at 4223*l.* 10*s.*, had been compulsorily taken by the North Eastern Railway Company, and the company having in reduction of the sum given a piece of land containing 9A. 2R. 38P. to the mayor and commonalty in trust for the freemen, valued at 1154*l.*, the sum of 122*l.* 15*s.* 7*d.*, less income tax, had been annually received by the pasture-masters as interest at 4 per cent. on the balance, which was not yet paid by the company.

The case also stated that the receipts of the pasture-masters were derivable solely (1) from the lands allotted by the award; (2) from the lands taken in exchange pro tanto for the lands taken by the North Eastern Railway Company; (3) from the Intack; (4) from the interest on the 3069*l.* 10*s.* due from the railway company; and that all payments other than those made to freemen and freemen's widows were payments for management or otherwise incidental to the office or duties of pasture-masters.

The case was heard by a Divisional Court, consisting of Denman and Wills, JJ., on July 9, 1891, when the Court held that as to the income and profits from the allotments on Clifton Common which were applied under the Act of 1763, they were exempt from duty under sub-s. 2 of s. 11 of the Act of 1885; but that the income and profits from the Intack, not having been applied under any Act of Parliament, were not exempt under sub-s. 2; and further that they were not exempt under sub-s. 3, not being appointed or applied for any charitable purposes within the meaning of the Act.

The Commissioners of Inland Revenue appealed from the judgment so far as it related to the allotments on Clifton Common, and the pasture-masters appealed from it so far as it related to the Intack.

Sir E. Clarke, S.G., and *Danckwerts*, for the Commissioners. The income and profits of the allotments on Clifton Common do not come within the exemptions in sub-s. 2 of s. 11 of the Act of 1885. They were not appropriated to the benefit of the public at large, or to the ratepayers or inhabitants of the ward. The allotments belong to the freemen of the ward, who are a limited

body, and are enjoyed by them for their own benefit. Nor are the income and profits applied in any manner expressly prescribed by an Act of Parliament, for the statute in the present case contains no directions as to the manner in which they are to be applied, and the corporation have always exercised a wide discretion in that matter. With respect to the Intack, the income and profits were not appropriated by any Act of Parliament within sub-s. 2, nor are they applied to any "charitable purpose" within sub-s. 3. The purposes are not charitable within the statute 43 Eliz. c. 4: *Commissioners of Income Tax* v. *Pemsel.* (1)

Lockwood, Q.C., and *H. Fellows*, for the pasture-masters. The income and profits of the allotments on Clifton Common are fairly within the words of sub-s. 2; being appropriated and applied in the manner expressly prescribed by the Act of 1763. The expression in the Act refers to the objects to which the profits are to be applied, not to the special mode in which this is to be done. With respect to the Intack the profits are applied to a "charitable purpose" within the meaning of sub-s. 3: *In re Christchurch Inclosure Act* (2); *Goodman* v. *Mayor of Saltash.* (3)

LORD HERSCHELL. This is an appeal from a decision of the Divisional Court upon a special case stated between the Commissioners of Inland Revenue and certain persons who possess, as freemen of a ward in the city of York, rights in respect of certain lands. It appears that, prior to the year 1762, the freemen inhabitants of ancient messuages in Bootham Ward had possessed rights of common of pasture over particular lands which were within the manor; and that an agreement in 1762 was arrived at between the lord of the manor and various persons having interest in the soil of the manor, for a division of their interests. This could not be carried out effectually except by means of an Act of Parliament, and in the year 1763 an Act was passed which provided that there should be set out and allotted to the mayor and commonalty of the city of York, "in trust for the freemen of the said city from time to time inhabiting in ancient messuages within Bootham Ward

(1) 22 Q. B. D. 296; [1891] A. C. 531.

(2) 38 Ch. D. 520.

(3) 7 App. Cas. 633.

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aforesaid, such part and share of the said common and moor nearest the said city of York as they, the said Commissioners or the survivor of them, shall deem and adjudge to be a full and adequate compensation and equivalent in value, as well for the said freemen's right of average in and upon the said enclosed lands and grounds within the said township of Clifton and the enclosed lands and grounds within Bootham Ward aforesaid, now subject to such right of average as aforesaid, as for the said freemen's right of common or stray in, over, and upon the said common and moor of Clifton"; and it further provided that such share and part of the said common and moor so allotted was to be fenced off. It further enacted that "such share and part of the said common, when so set out and allotted and fenced off as aforesaid, shall from thenceforth for ever thereafter be held and enjoyed by the freemen of the said city from time to time inhabiting in ancient messuages within Bootham Ward aforesaid in severalty, exclusive of all others, and exempt from the payment of all tithes," and so on. Now, by virtue of that statute, and by virtue of that statute alone, a certain piece of land became appropriated to the enjoyment of the freemen of Bootham Ward in the city of York; and, although vested in the mayor and commonalty—that is to say, the corporation of the city—was held by them in order that it might be enjoyed in the manner provided by the Act by the freemen. I will deal presently with another allotment made under the Act, but for the moment confine my attention to this particular piece of land.

It appears that the freemen from time to time enjoyed the pasturage of this piece of land; but, as time went on, other arrangements were made amongst them, without objection upon the part of the trustees, the mayor and commonalty of the city. The freemen made a charge to persons who were not freemen for the privilege of grazing upon this land, and the money which was derived from this enjoyment by the persons not entitled under the trust was employed for the benefit of the freemen, and, with an exception which I will allude to in a moment, that land has been held and enjoyed by the freemen down to the present time.

The only exception, if it was an exception, is this—that a

limited number of widows of freemen have received certain payments. Now, the freemen at any given time might, perhaps (I will assume that to be the case), have taken exception to this payment being made to the widows, and have insisted that the land was to be held and enjoyed by the freemen, and all the profits of the land, whatever they were, were to be divided amongst them. But if the freemen who were entitled to insist upon that did not do so, the fact that certain payments were made to the widows of deceased freemen, did not prevent the property being held and enjoyed by the freemen as prescribed by the Act of Parliament. Because they chose that the enjoyment should be such as that the whole of the money should not come to them, but that part of it, by their desire, should go to the relief of the widows of those who had been freemen before, it cannot be said that that was an application of the profits of this land otherwise than in the manner provided by the Act. Of course, if this payment to the widows is in respect of a right to which they are entitled within the terms of the Act, then the application would be according to the Act; but if it is to be treated as made by reason merely of the freemen assenting to a certain limited portion of the money which would have come to them going to the widows of previous freemen, I do not think it can be treated otherwise than as an enjoyment by the freemen by means of their making this contribution to the widows of those who had been freemen before. Therefore the income of this property has been applied in the manner provided by the trusts under the terms of this enactment.

That being so, the question arises whether it is within the exemption contained in the Customs and Inland Revenue Act, 1885, s. 11, sub-s. 2. The 11th section undoubtedly would apply to taxation of property of this description. It was intended to bring within the area of taxation property which, by reason of its being enjoyed by bodies corporate or unincorporate, was not subject to taxation under the Probate, Legacy, or Succession Duty Acts; but then that property was made taxable only with certain exceptions, one of which is in these terms: "Property which, or the income or profits whereof, shall be legally appropriated and applied for the benefit of the public at large, or of

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any county, shire, borough, or place, or the ratepayers or inhabitants thereof." Now, this property would not come within those words, because it is not applied for the benefit of the inhabitants of a place, namely, Bootham Ward, but for the benefit only of a portion of the inhabitants of that place, namely, the freemen, and the only portion of the inhabitants of the place who are dealt with by the earlier part of the section are those coming within the description of "the ratepayers." But having dealt in that way with property the income or profits of which shall be applied to the benefit of the inhabitants of the place, the sub-section proceeds to exempt equally "property which, or the income or profits whereof, shall be legally appropriated and applied in any manner expressly prescribed by Act of Parliament." Now, the question is whether this property, and the income or profits thereof, are legally appropriated in the manner provided by the Act of Parliament; and, in common with the Court below, I cannot entertain any doubt that they are. I do not think that this section requires that the Act of Parliament shall prescribe the manner of enjoyment of the property, or the manner of the enjoyment of the income of the property. What is exempted is property which is legally appropriated in the manner prescribed by the Act of Parliament. This property was appropriated in express terms to a prescribed object; and, if so, it was surely property appropriated in the manner expressly prescribed by Act of Parliament, the object being the enjoyment of it by the freemen of this ward of the city of York, and that being the only object to which the property, or income, or profits could be applied. What was the reason for inserting these words at the end of sub-s. 2, it is not necessary to speculate upon, and it would be dangerous to speculate in a case of this description. The only safe course to take is to follow the ordinary and natural meaning of the words that are used. If we depart from them we may run the risk of not carrying out that which was intended by the legislature, and it seems to me that it would be a departure from the ordinary and natural sense of the language used if we held that this was not property which, or the income or profits of which, were legally appropriated in a manner expressly prescribed by Act of Parliament. I

think, therefore, that the judgment upon that point should be affirmed.

It is not necessary to say much with regard to the other piece of land. There was a provision that another piece of land should be set out for the purpose of providing for the maintenance of a road; subject to the maintenance of that road, the benefit of that piece, as well as the other, was intended for the freemen. The whole of the trust in relation to the repair of the road has been performed, although a portion of the road is no longer repaired by the freemen, having been taken over by the railway company and repaired by them. But it is said that, because the repairs have not been done from profits derived from this particular eight acres, but from what I will call a general fund derived from both plots of land, the income has not been applied in the manner prescribed by the Act. That is not a view which it is possible to give countenance to. It seems to me, therefore, that the whole of the land and the income of the property is exempt according to the true construction of this 2nd sub-section of s. 11, and, therefore, the judgment ought to be affirmed.

With regard to the cross appeal, which raises a question of importance and difficulty as to the meaning of the words any "charitable purpose," it will be necessary to take time to consider our judgment.

As to the question of costs, we will reserve it until that point has been decided.

LINDLEY, L.J. I am of the same opinion, and for the same reasons, and I have nothing further to add except this: With regard to the widows, I do not think that the section presents any difficulty. The application contemplated by the Act of Parliament is an application by a trustee to a cestui que trust, not what the cestui que trust does with the money when obtained. If these men choose to give the money to their companions, or to anybody else, that is not a matter contemplated by the section.

KAY, L.J. I am of the same opinion. It is in this case expressly prescribed by the Act of Parliament of 1763, that this

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land (I deal only with the larger portion of it, but there is no essential difference between the two) should after it was fenced off for ever thereafter "be held and enjoyed by the freemen of the said city from time to time inhabiting in ancient messuages within Bootham Ward." Now, it is said that the express provision of the Act of Parliament of 1763 does not satisfy the words of sub-s. 2 of s. 11 of the Inland Revenue Act, 1885, because of the word "manner" which is used in that sub-section. It is said, as I understand the argument, that the Act does not say in what manner the freemen are to enjoy this income, and accordingly this does not satisfy that word. I am really unable to follow that argument, because, with all respect, you might reduce the argument to an absurdity by supposing that the Act of 1763 had said the income should be enjoyed by them in certain proportions, in which case it would have satisfied the Act. It has not limited the proportions or expressed them; and, consequently, it must be taken that they are to have an equal enjoyment of it. Therefore, practically you do get sufficient, even upon that construction, to satisfy the words. But I think the real meaning is this: that the word "manner" only applies to the nature of the appropriation. The nature of the appropriation here is that it is to be held and enjoyed by the freemen inhabiting the ancient messuages within that ward. I am the more led to this conclusion from the consideration, that those cases which are expressly exempted in this sub-s. 2 are so closely analogous to this particular trust that there is no reason whatever why it should not come within the latter part of the provision. The exemption is of "property which, or the income or profits whereof, shall be legally appropriated and applied for the benefit of the public at large, or of any county, shire, borough, or place, or the ratepayers or inhabitants thereof." Now, take the last words: it is property appropriated and applied for the benefit of the ratepayers of a place, or the inhabitants of a place. What difference, looking at the object and purpose of the Act, and the object and purpose of this exemption, can there be, for instance, between the ratepayers of a place and another portion of the inhabitants of that place defined in a different manner, as it is here, freemen of a particular ward

inhabiting in ancient messuages within it? I agree that they are not within the particular words which precede the words at the end which we have to consider; but when we are considering the meaning of the words at the end it makes it, to my mind, more easy to bring this case within them when you see that it is a case entirely analogous to those which have been specified in other parts of the exemption clause; and it therefore comes within the reason of the exemption, so far as any reason for it can be imagined to exist. I agree with what has been said by the other members of the Court upon this point.

Appeal dismissed.

1892. March 10. The Court gave judgment on the appeal of the pasture-masters.

LORD HERSCHELL. The freemen of the city of York inhabiting in Bootham Ward had from time immemorial, prior and up to the year 1632, enjoyed and exercised right of pasturage over the common of Huntington in the vicinity of that city. The common was inclosed in 1632, when the then lord of the manor agreed with the mayor and commonalty of York that he would, in satisfaction of the right claimed by the city in the common of Huntington which he had then lately enclosed, make an estate in fee to feoffees to the use of the mayor, of a full fourth part of the soil he had so enclosed to be set out in severalty from the other parts. A portion representing one-fourth of the common and containing about sixty acres, now known as the "Intack," was afterwards enclosed, and a conveyance thereof was, it is believed, duly executed by the lord of the manor in accordance with his agreement, though the conveyance cannot now be found. The freemen inhabitants of Bootham Ward have since 1632 enjoyed the exclusive right of pasturage over this piece of land. The question for determination is whether the land known as the "Intack," acquired from the lord of the manor as aforesaid, is subject to the duty imposed by the statute 48 & 49 Vict. c. 51, or whether it is exempt from the duty imposed by that statute as falling within the exemptions contained in the 2nd or 3rd sub-sections

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of s. 11 of the Act. That section, after reciting that certain property by reason of the same belonging to or being vested in bodies corporate or unincorporate escapes liability to probate, legacy, or succession duties, and it is expedient to impose a duty thereon by way of compensation to the revenue, enacts that there shall be levied and paid to Her Majesty in respect of all real and personal property which shall have belonged to or been vested in any body corporate or unincorporate, during any year, a duty at the rate of 5 per cent. upon the annual value, income, or profits of such property. The section then exempts from such duty, (2.) "property which, or the income or profits whereof, shall be legally appropriated and applied for the benefit of the public at large, or of any county, shire, borough, or place, or the ratepayers or inhabitants thereof, or in any manner expressly prescribed by Act of Parliament;" (3.) "property which, or the income or profits whereof, shall be legally appropriated and applied for any purpose connected with any religious persuasion, or for any charitable purpose, or for the promotion of education, literature, science, or the fine arts." There can be no doubt that the land called the "Intack," over which the freemen inhabitants of the Bootham Ward enjoy right of pasturage, is by the enacting words of the 11th section subjected to the duty. The only question is whether it is within either of the exemptions. It is contended on behalf of the appellants that it is "property which, or the income and profits whereof, is legally appropriated and applied for a charitable purpose." In order to establish that the land in question was vested in the mayor of York upon a charitable trust, the appellants relied upon the decision of this Court in the case of *In re Christ Church Inclosure Act.* (1) I think that case and the case of *Goodman* v. *Mayor of Saltash* (2), which it followed, do establish the proposition contended for. If, therefore, the words "charitable purpose" in the exemption are to be construed as extending to all charitable trusts, using those words in the very wide sense attributed to them in our Courts, it would follow that the exemption applies to the case before us. But it is to be observed that if that extended meaning be given to the words "charitable purpose"

(1) 38 Ch. D. 520. (2) 7 App. Cas. 633.

the whole of sub-s. 2, except perhaps the exemption of property "applied in the manner expressly prescribed by Act of Parliament," would be wholly unnecessary, and the terms in which the exemption is provided for, namely, that the imposition of the duty is to be subject to exemption in favour of property "of the descriptions following," certainly appear to indicate that property described in sub-s. 2 was not regarded as within the description contained in sub-s. 3. Moreover, the words in that sub-section which immediately precede and follow the words "for any charitable purpose" are unnecessary if the construction contended for be correct. It cannot be doubted that property held by a body corporate or incorporate "for the promotion of education, literature, science, or the fine arts," is, technically speaking, held upon a charitable trust. The appellants naturally placed their main reliance upon the decision of the House of Lords in the *Commissioners of Income Tax* v. *Pemsel* (1); they urged that the same construction ought to be put upon the words "charitable purposes" in this Act as they were held to bear in the Income Tax Act, and they pointed out that in the latter Act the existence of specific exemptions was not allowed to restrict the wide meaning given to the words "trustees for charitable purposes." Now, I do not see any ground for departing from what I there said with regard to the little weight to be attached to the mere fact that specific exemptions were found which would be covered by the wider general words; but, after all, each statute must be looked to by itself for the purpose of ascertaining its meaning and the position in which the general words are found, and the nature of the specific exemptions cannot be lost sight of. In the Income Tax Act the words "vested in trustees for charitable purposes" followed certain specific exemptions; they were not succeeded by words of more limited scope. The specific exemptions subsequently provided for were in a different part of the Act. In the present case the words we have to construe are placed, as I have pointed out, between specific exemptions which, if used in their widest sense, they would be sufficient to cover, and it can scarcely be supposed that the exemptions contained in sub-s. 2 were in the present case inserted ex majori cautelâ

(1) [1891] A. C. 531.

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to allay the fears of those who might be interested in any particular institutions, for the property first described is property appropriated and applied "for the benefit of the public at large." All these considerations satisfy me that the words "for any charitable purpose" cannot have been used in this enactment in the wide sense contended for. If this conclusion be correct, it follows that the property in question is not exempt, for it can only be said to be applied to a charitable purpose in the technical sense of those words. It is unnecessary, and would be undesirable, to attempt a definition of what are "charitable purposes" within the meaning of the exemption. It is sufficient to say that, giving those words the widest interpretation of which they are capable short of the technical one to which I have referred, the present case is not within them. I think, therefore, that the judgment appealed from must be affirmed.

LINDLEY, L.J. I have had the advantage of reading Lord Herschell's judgment, and I entirely concur in it.

KAY, L.J. I also agree.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; W. Wilkinson, for R. & R. P. Dale, York.*

M. W.

C. A. 1892 *April* 13; *May* 5.

[IN THE COURT OF APPEAL.]

MILLINGTON *v.* HARWOOD.

Practice—Costs—Taxation on County Court Scale—Judgment for 50*l.*—*Order* LXV., *r.* 12—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 116.

If the plaintiff in an action in the High Court which might have been brought in a County Court, recovers 50*l.* and no more, he is only entitled, in the absence of a special order or certificate by the judge, to costs on the County Court scale.

THIS was a summons referred to the Court from chambers, by Pollock, B.

The plaintiff in an action founded on contract, and brought in the High Court, claimed 50*l.*, and obtained judgment for that sum and costs. Charles, J., who tried the case without a jury, refused to make an order for costs on the High Court scale, or to

certify that there was a sufficient reason for bringing the action in that Court.

On taxation, the master proceeded to tax the costs on the County Court scale. The plaintiff delivered objections to the taxation, and took out this summons for a review, asking for an order that the costs might be taxed on the High Court scale.

Roskill, for the plaintiff. By Order LXV., r. 12, in actions founded on contract, in which the plaintiff recovers a sum (exclusive of costs) "not exceeding 50*l.*," he shall be entitled to no more costs than he would have been entitled to had he brought his action in a County Court, unless the Court or a judge otherwise orders. That rule, which was made in 1883, is inconsistent with, and has been impliedly repealed by, s. 116 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), which provides that, with respect to any action brought in the High Court which could have been commenced in a County Court, if, in an action founded on contract, the plaintiff shall recover a sum less than 20*l.*, he shall not be entitled to any costs of the action, and if he shall recover a sum of 20*l.* or upwards, "but less than 50*l.*, he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in a County Court, unless a judge of the High Court certifies that there was sufficient reason for bringing the action in that Court, or unless the High Court, or a judge thereof at chambers, shall, by order, allow costs." Sect. 116 of the County Courts Act, 1888, is made expressly to apply to all actions in the High Court which could have been brought in the County Court: see s. 67 of the Judicature Act, 1873, and s. 187 of the County Courts Act, 1888. Here the plaintiff has recovered exactly 50*l.* It is submitted that by s. 116 of the County Courts Act, 1888, the legislature meant to alter the limit in respect of which a plaintiff could only get his costs upon the County Court scale, unless he obtained an order allowing them on the High Court scale. Although this action could have been commenced in the County Court, and the plaintiff has recovered a sum upwards of 20*l.*, he has not recovered "less than 50*l.*" He is, therefore, entitled to costs upon the High Court scale.

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[He referred to *Barker* v. *Hempstead* (1); *Evans* v. *Edwards*. (2)]

Shearman, for the defendant, was not heard.

A. L. SMITH, J. This is an application by a plaintiff who has recovered 50*l.* in an action founded on contract and brought in the High Court, for his costs on the High Court scale. The judge at the trial did not certify that the action was a fit one to be brought in the High Court, nor did he make any order for costs on the High Court scale. The question is, whether the plaintiff, having recovered exactly 50*l.*, is entitled to his costs of the action on the High Court scale. I am of opinion that he is only entitled to costs on the County Court scale. There can be no doubt that the case is within the terms of r. 12 of Order LXV., because the words of the rule are "in actions founded on contract, in which the plaintiff recovers a sum . . . . not exceeding 50*l.*, he shall be entitled to no more costs than he would have been entitled to had he brought his action in a County Court, unless the Court or a judge otherwise orders." The words "not exceeding" are conclusive, for here the plaintiff has recovered 50*l.*, and no more. It was said, however, that rule 12 has been superseded by s. 116 of the County Courts Act, 1888, which provides, with respect to actions brought in the High Court which might have been commenced in a County Court, that if, in an action founded on contract, the plaintiff recovers less than 20*l.*, he shall have no costs at all, and if he recovers 20*l.* and upwards, but "less than 50*l.*," he shall only be entitled to County Court costs. I cannot see how s. 116, which deals with the case of a man recovering less than 50*l.*, can be said to repeal the rule which deals with the case of a man recovering a sum not exceeding 50*l.* In my judgment the rule applies. A plaintiff who has recovered the exact sum of 50*l.*, must, if he wants to get his costs on the High Court scale, obtain the judge's order or certificate for them. If he does not, he is only entitled to costs on the County Court scale.

WRIGHT, J. I am of the same opinion. To support the contention that rule 12 of Order LXV. has been impliedly repealed by

(1) 23 Q. B. D. 8. (2) W. N. (1883) 194.

s. 116 of the County Courts Act, 1888, some real inconsistency between the provisions of the rule and of the section must be discovered; otherwise we are bound to give effect to the language of both. As my learned brother has pointed out, s. 116 deals with the case of a plaintiff who recovers "less than 50*l*.," whilst rule 12 applies where the plaintiff has recovered a sum "not exceeding 50*l*." We cannot refuse to give effect to the plain language of the rule where there is nothing in the section so inconsistent with the rule as to compel us to disregard it. I am of opinion that the plaintiff in this case is only entitled to costs on the County Court scale. His application, therefore, must be refused.

Application dismissed.

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From this decision the plaintiff again appealed. The appeal was heard on May 5, 1892.

Roskill, for the plaintiff. Sect. 116 of the County Courts Act, 1888, applies to any action brought in the High Court that could have been commenced in a County Court, and, therefore, to this action; moreover, the section is expressly so applied by virtue of s. 67 of the Judicature Act, 1873, as altered by s. 187 of the County Courts Act, 1888. The section has been held to apply even to the case of a remitted action: *Wilson* v. *Statham*. (1) It follows that if the plaintiff in an action in the High Court which might have been commenced in a County Court, recovers judgment with costs for an amount larger than that for which the scale of costs is by s. 116 of the County Courts Act, 1888, restricted to the County Court scale, he is entitled to have his costs taxed on the High Court scale. Under this section, certain conditions, and those only, must be satisfied to enable a plaintiff to have his costs taxed on the High Court scale, but Order LXV., r. 12, prescribes certain other conditions, and to that extent is inconsistent with, and has been superseded by, s. 116: *Barker* v. *Hempstead*. (2) Moreover, the rule made by virtue of the powers contained in s. 17 of the Judicature Act, 1875, should be read as being subject to the provisions of the Judicature Acts, and,

(1) [1891] 2 Q. B. 261. (2) 23 Q. B. D. 8.

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therefore, to s. 67 of the Judicature Act, 1873. So far as Order LXV. in any way altered, enlarged, or limited the provisions of s. 5 of the County Courts Act, 1867, expressly preserved and applied by s. 67 of the Judicature Act, 1873, it would have been held ultrà vires: *Evans* v. *Edwards*. (1) But s. 116 of the County Courts Act, 1888, is now substituted for s. 5 of the repealed Act of 1867, in s. 67 of the Judicature Act, 1873; and Order LXV., r. 12, should therefore be construed as subject to s. 116 of the County Courts Act, 1888; and the rule, so far as it enlarges, or is in any way inconsistent with, the provisions of this section, should now be held to be repealed.

Shearman, for the defendant, was not called on.

LINDLEY, L.J. The question in this appeal is not free from difficulty. The action was brought in the High Court of Justice for 50*l*., and at the trial the plaintiff recovered 50*l*. and costs. Now arises the question—the judge not having ordered the costs to be paid on the High Court scale, and having given no certificate that the action was proper to be tried in the High Court—whether the plaintiff is entitled to costs on the High Court scale, or only to such costs as he would have obtained if the action had been tried in the County Court. That depends on the 116th section of the County Courts Act, 1888, and Order LXV., r. 12. The taxing master took the view that the plaintiff was only entitled to County Court costs, following the rule; and his opinion has been affirmed by the Divisional Court. An appeal is now brought from their decision. The plaintiff relied on the words of the statute, which certainly raise an inference in his favour, as they appear at first sight to be inconsistent with the words of the rule. The 116th section of the County Courts Act, 1888, runs thus: "With respect to any action brought in the High Court which could have been commenced in a County Court, the following provisions shall apply." Then sub-s. 1 says: "If, in an action founded on contract, the plaintiff shall recover a sum of less than 20*l*., he shall not be entitled to any costs of the action, and if he shall recover a sum of 20*l*. or upwards, but less than 50*l*., he shall not be entitled to any more

(1) W. N. (1883) 194.

costs than he would have been entitled to if the action had been brought in a County Court." Now, stopping there, there certainly may be an inference that if the plaintiff recovered exactly 50*l.* he would be entitled to High Court costs; but it is merely an inference, and there are no words which expressly say so. Then we pass on to sub-s. 2, the first part of which applies to actions founded on tort, and then follows an exception which applies to actions founded on contract as well as on tort, and is in these words: "Unless a judge of the High Court certifies that there was sufficient reason for bringing the action in that Court, or unless the High Court, or a judge thereof at chambers, shall, by order, allow costs." Then follows the proviso, "Provided that if, in any action founded on contract, the plaintiff shall within twenty-one days after the service of the writ, or within such further time as may be ordered by the High Court or a judge thereof, obtain an order under Order XIV. of the Rules of the Supreme Court empowering him to enter judgment for a sum of 20*l.* or upwards, he shall be entitled to costs according to the scale for the time being in use in the Supreme Court." Now, what is the inference which we must draw from the whole of this section? The inference that I draw is, that if an action on contract which might have been brought in a County Court is commenced in the High Court, County Court costs are to be given as a rule; but, inasmuch as the County Court judge has no power to give judgment under Order XIV., it is provided that if a plaintiff obtains judgment in the High Court under Order XIV. he is to be allowed High Court costs. I agree that this section only expressly deals with judgments for a sum under 50*l.*, and does not in express terms touch judgments for exactly 50*l.* Then we come to Order LXV., r. 12. [The Lord Justice read the rule.] Here is a rule, which has the force of an Act of Parliament, and it is in express terms applicable to the present case—there is no question about that. But it is contended that the rule should be read as subject to the County Courts Act and the Judicature Act, 1873; but, while admitting the force of this argument, I see no reason to hold that what apart from the rule would be merely a probable inference can prevail over the express words of the rule. The appeal must, therefore, be dismissed.

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KAY, L.J. I entirely agree. The appellant relies upon the 116th section of the Act of 1888, which differs in terms from Order LXV., r. 12. But we must begin with considering the rule, which has the effect of an Act of Parliament. That rule provides for the exact case before us. The action was brought for 50*l.*, and, therefore, might have been commenced in the County Court, and 50*l.* was recovered. The rule says expressly that in such a case the plaintiff shall only be allowed County Court costs. Then afterwards—that is, in 1888—the County Courts Act was passed. No doubt, the 1st sub-section of s. 116 primâ facie refers to actions which might have been commenced in a County Court, and in which less than 50*l.* is recovered; but when we look at the words of the 2nd sub-section, it is, I think, clear that the section is intended to apply to the same cases as Order LXV., r. 12, applies to, and to limit the costs in all actions which might have been brought in a County Court. It was intended to make the section applicable to any action in the High Court which could have been brought in the County Court. I agree that it does not in terms apply to actions in which 50*l.* exactly is recovered. If I might conjecture, it was a slip of the draftsman; the words should have been "but not exceeding 50*l.*" There is, therefore, a certain inconsistency between the statute and the rule. But what is the doctrine of the Court in such a case? If a subsequent Act does not in terms repeal a previous Act, and does not expressly refer to that Act, we must find such an inconsistency as that the two Acts cannot be read together. Now, there is no such absolute inconsistency as makes it necessary that we should presume that this Act repealed the rule then in operation, which had the form of an Act of Parliament. Therefore, I hold that the taxing master and the learned judges are right in their decision, and that this appeal must fail.

Appeal dismissed.

Solicitors for the plaintiff: *Millington & Drew.*
Solicitors for the defendant: *Gordon & Dalbiac.*

M. W.

[IN THE COURT OF APPEAL.]

C. A.
1892
May 25.

LONDON COUNTY COUNCIL, APPELLANTS; CHURCHWARDENS AND OVERSEERS OF WEST HAM, RESPONDENTS. [2]

Practice—Costs—Jurisdiction—Proceedings on the Crown Side of the Queen's Bench Division—Order LXV., *r.* 1—*Judicature Act*, 1890 (53 & 54 *Vict. c.* 44), *ss.* 4, 5.

The practice in proceedings on the Crown side of the Queen's Bench Division is unaltered by the Judicature Act, 1890, and there is, therefore, no power to give costs to a successful appellant in a case stated by quarter sessions.

QUESTION of costs reserved on the argument of this case. (1)

On an appeal from a judgment of the Queen's Bench Division on a special case stated by quarter sessions on an appeal against a poor-rate for the parish of West Ham in the West Ham Union, the Court of Appeal reversed the decision of the Queen's Bench Division in favour of the respondents and allowed the appeal. The appellants applied for costs.

R. T. Reid, Q.C., and *John Montefiore*, for the respondents. There is no power to make an order for costs against the respondents. A case stated by quarter sessions was formerly brought into the Queen's Bench by certiorari, and the appellant had to give a recognizance, and on that undertaking, if the appellant was unsuccessful, he was made to pay the costs. After Order LXV. (2) came into operation, it was thought that a new jurisdiction as to costs was created; but it was pointed out in *In re Mills' Estate* (3) that the Court had no jurisdiction under the Judicature Acts and the rules to order costs to be paid by persons who before those Acts came into operation could not have been ordered to pay them. The Judicature Act, 1890, left this matter as it stood before, only expressing in an Act the effect of Order LXV. in order to remove any doubt as to the

(1) See ante, p. 44.

(2) Order LXV., r. 1: "Subject to the provisions of the Acts and these Rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge. . . ."

(3) 34 Ch. D. 24.

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jurisdiction to make that order. (1) *Garnett* v. *Bradley* (2) shews that costs on the Common Law side are the creation only of statute, and *Reg.* v. *Parlby* (3) is in point.

Morten, appeared for the assessment committee.

Avory, for the appellants. There is a confusion between a recognizance on which the Court ordered an appellant to pay costs and the general jurisdiction of the Court over costs. At all events, since Order LXV. the Court would have jurisdiction to order payment of the costs by the unsuccessful party in such a case as this, which is a civil proceeding on the Crown side. *In re Mills' Estate* (4) was a decision not as to the costs of proceedings in the Supreme Court, but as to costs of proceedings outside the Court, and did not touch this question. The cases would be analogous if the appellants were asking for costs incurred before the Court of quarter sessions. As to the Judicature Act of 1890, s. 4 was meant to prevent the application of ss. 1 and 2 to proceedings on the Crown side, and it is followed by s. 5, which is perfectly general. [He cited *Reg.* v. *Meyer* (5); *Foster* v. *Great Western Ry. Co.* (6)]

LORD ESHER, M.R. This was a proceeding on the Crown side of the Queen's Bench Division, and before the Judicature Acts there was a practice with regard to costs which arose from an inherent incapacity of the Queen's Bench to deal with the costs in such a case as this. I accept the doctrine that at Common Law no Court of Common Law had jurisdiction to give costs at all, and that the whole power in those Courts to give costs is given them by statute, and in such a case as this there was no

(1) 53 & 54 Vict. c. 44, s. 4: "Nothing in this Act shall alter the practice in any criminal cause or matter or in bankruptcy, or in proceedings on the Crown side of the Queen's Bench Division."

Sect. 5: "Subject to the Supreme Court of Judicature Acts and the rules of Court made thereunder, and to the express provisions of any statute, whether passed before or after the commencement of this Act, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge, and the Court or judge shall have full power to determine by whom and to what extent such costs are to be paid."

(2) 3 App. Cas. 944.

(3) W. N. (1889), p. 190.

(4) 34 Ch. D. 24.

(5) 1 Q. B. D. 173.

(6) 8 Q. B. D. 515.

statute which had given them jurisdiction to deal with such costs as are now in question.

Then came the Judicature Act, and the Rules and Orders, amongst others Order LXV., r. 1. The Court had, with regard to this very matter, to construe Order LXV. In the case of *In re Mills' Estate* (1) the conclusion to which the Court came was that, upon the true construction of that rule, it did not assume to give the Court power over costs, or jurisdiction over costs, where the Court had never had jurisdiction before, but it gave to the Court power to deal with costs in a particular way, different from that in which the costs had been dealt with before in cases where the Courts had jurisdiction over the costs. That altered the practice, but it did not enlarge the jurisdiction. There were doubts expressed in some quarters about that rule and order, and the legislature, in the statute 53 & 54 Vict. c. 44, put the matter beyond doubt by an enactment which gives a statutable rule to the same effect as that order; but it seems to me obvious that the legislature in 1890, when they passed that Act, knew of the limitation on the generality of the words of Order LXV. which had been put on them by the Court, and adopted that limitation. The way they adopted that limitation was by using the general words of the order in s. 5 of the statute, but also taking out from the generality of the words in s. 5 the matters which are dealt with in s. 4. The true construction of ss. 4 and 5 is this, that s. 5 is a general enactment, and s. 4 has the effect of a proviso on the generality of the words in s. 5.

Then the whole question will be whether this case comes within the words of s. 4. The expression "nothing in this Act" includes s. 5. It has been argued that these words apply to the preceding sections only; but that would be to read in the word "hereinbefore." That is to add words to the section, which we are not allowed to do.

Then it is said the words of s. 5 should be allowed their full import unless there is something in the context which shews that they must be read with a more limited meaning. That is a true proposition enough; but there is something in the context of the Act, and that is s. 4. According to all rules of construction,

(1) 34 Ch. D. 24.

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it seems to me that the Act has made the matter clear in respect of the question which we have now to decide. It shews that we have no power to deal with the costs in such a proceeding as this.

FRY, L.J. I am of the same opinion. I shall not travel over the whole of this argument; but there is one point on which I desire to say a word, and that is with regard to the construction of the Act of 1890. Both in *Foster* v. *Great Western Ry. Co.* (1) and in *In re Mills' Estate* (2) this rule of construction was applied to Order LXV., namely, that the effect of that order was not to enlarge the jurisdiction over costs, but to indicate the mode in which the jurisdiction might be exercised. Now I rather incline to think that the effect of s. 5 of the Act of 1890 is in many cases to give jurisdiction to grant costs. The general words of the 5th section seem to me to be intended to give jurisdiction, if necessary. The rule of construction, therefore, laid down in *In re Mills' Estate* (2), may not hereafter be generally applicable, and it may be that the contention on behalf of the appellants would have succeeded but for the 4th section, which excludes from the operation of the whole Act the particular class of proceeding which we have to deal with. Therefore the Act of 1890 does not give us power to deal with these costs.

LOPES, L.J. In former times a case like this would have been brought up by a certiorari. The certiorari has been dispensed with by Act of Parliament, and, therefore, is no longer necessary; but the case stands precisely in the same position as if it had been brought up by certiorari. What would have been the state of things if it had been brought up by certiorari? There would have been no inherent or original jurisdiction in the Courts to deal with costs. The only jurisdiction they would have would be under a statute or under the recognizances. There is no jurisdiction by any statute; therefore, it follows that the only jurisdiction to deal with costs would be under the recognizance. But then the recognizance only applies where the order is affirmed. If the order is affirmed the successful party

(1) 8 Q. B. D. 515. (2) 34 Ch. D. 24.

obtains costs under the recognizance; if the order is quashed there are no costs. That was the state of things before the Judicature Acts. In my opinion, the Judicature Acts have introduced no change. I entirely agree with the statement of the law in this respect made by Master Mellor, and referred to by Huddleston, B., in *Reg.* v. *Parlby.* (1) I also entirely agree with—and I think it worth while to read—what was said by Cotton, L.J., in *In re Mills' Estate.* (2) He says: "In my opinion, having regard to that and to the object here expressed, which was to be provided for by Rules and Orders, the true construction of this Order"—that is, Order LXV.—"is that it was only intended to regulate the way in which costs were to be dealt with when power was given to the Court, or, independently of Act of Parliament, the Court had power to deal with costs." Therefore, it appears that things are precisely as they were previously to the passing of the Judicature Acts. If it were necessary to fortify that view, it seems to me that it is strongly fortified by s. 4 of the Act of 1890.

The result is, therefore, in this case that, the order having been quashed, this Court has no jurisdiction to deal with the costs at quarter sessions, nor in the Divisional Court, nor here.

Application for costs refused.

Solicitor for appellants: *W. A. Blaxland.*
Solicitor for churchwardens: *A. A. Barnes.*
Solicitors for assessment committee: *Hillearys.*

(1) W. N. (1889), p. 190.

(2) 34 Ch. D. 24.

A. M.

1892
Feb. 26.

CURTIS *v.* MUNDY.

Practice—Discovery—Documents—Infant.

An infant party to an action cannot be compelled to make discovery of documents.

APPEAL from the order of a judge at chambers in an action to recover damages against the high sheriff of Derbyshire for wrongful execution ordering the plaintiffs, infants suing by their next friend, to make discovery of documents.

W. E. Ball, for the plaintiffs. An infant party to an action cannot be compelled to make discovery: *Mayor* v. *Collins*. (1) It is true that that case in terms only decides that an infant cannot be compelled to answer interrogatories; but there is no difference in principle between discovery of documents and discovery by means of interrogatories.

[CAVE, J. The decision in that case was certainly intended to lay down the general principle that discovery cannot be obtained against an infant.]

[He was stopped by the Court.]

Toller, for the defendant. As to interrogatories, the question is concluded by authority; different considerations, however, apply to discovery of documents. The ground of the decision in *Mayor* v. *Collins* (1) is that under the old Chancery practice an infant could not be compelled to answer interrogatories, and that that practice had not been altered by the provisions as to procedure contained in the Judicature Acts. But ss. 19 and 20 of the Chancery Procedure Act, 1852 (15 & 16 Vict. c. 86), draw a distinction between interrogatories and discovery, and under s. 20, which is general in its terms, there is a right to discovery of documents even as against an infant plaintiff.

[WRIGHT, J. The distinction between discovery and interrogatories seems to be drawn in those sections; but we cannot differ from the opinion, though not in terms a decision, of Lindley, L.J., in *Redfern* v. *Redfern* (2), who says: "It has cer-

(1) 24 Q. B. D. 361. (2) [1891] P. 139.

tainly been the long-established rule in Chancery not to require an infant to make discovery, and the same rule was followed in the Queen's Bench Division in *Mayor* v. *Collins*. (1)]

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PER CURIAM (Cave and Wright, J.J.) The appeal must be allowed, subject to satisfactory evidence of the ages of the plaintiffs being produced to the Master.

Appeal allowed.

Solicitor for plaintiffs: *F. C. James.*

Solicitors for defendant: *Taylor, Hoare, & Box, for Rooke & Midgley, Leeds.*

W. J. B.

THE QUEEN *v.* TIDY.

1892

June 14, 15.

Quo Warranto—Acceptance of incompatible Office—Non-corporate Office—Necessity for User.

In order to make the remedy by quo warranto applicable in the case of a non-corporate office, there must be something more than mere acceptance of the office.

Defendant, while holding the office of churchwarden, was proposed for the office of vestry clerk and declared elected. He published a letter thanking the electors, but never acted as vestry clerk.

On an application for a quo warranto, on the ground that the office of vestry clerk was incompatible with that of churchwarden:—

Held, that what defendant had done was not such an exercise of the office of vestry clerk as to render the remedy by quo warranto applicable.

AN order nisi was granted on May 12, 1892, for an information in the nature of a quo warranto to shew by what authority the defendant, Mr. Tidy, claimed to exercise the office of vestry clerk for the parish of Ealing.

Mr. Tidy was churchwarden, and his term of office expired at Easter, 1892. Before that date, and while he held the office of churchwarden, a meeting was held for the election of a vestry clerk. Mr. Tidy was proposed for the office of vestry clerk. It was objected that he already held the office of churchwarden, which was incompatible with the office of vestry clerk; but he was declared elected. He published a letter of thanks to the electors for having elected him; but he had not acted in the

(1) 24 Q. B. D. 361.

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performance of the duties of the office of vestry clerk, and he had announced that he accepted on the condition that he was not to act in that office until his term of office as churchwarden should have expired.

Channell, Q.C. (*Wedderburn*, with him), shewed cause.

A. B. Kempe, supported the rule.

[The following authorities were referred to: *Rex* v. *Ponsonby* (1); *Rex* v. *Whitwell* (2); *Rex* v. *Tate* (3); *Reg.* v. *Slatter* (4); *Reg.* v. *Coaks* (5); *Reg.* v. *Blizard* (6); *Reg.* v. *Jones* (7); *Reg.* v. *Mayor of Bangor* (8), affirmed in the House of Lords by *Pritchard* v. *Mayor of Bangor*. (9)]

WRIGHT, J. I am of opinion that the order nisi ought to be discharged, on the ground that we are bound by the decision of the Court of Queen's Bench in *Reg.* v. *Jones* (7), a case which was decided as long ago as 1873, which has probably been under the consideration of the Courts, and which is a decision on a point of practice. Apart from that case, there might perhaps be much to be said in favour of the view that, where all has been done that need be done, the office is to be regarded as full, and the remedy by quo warranto may be applicable. But *Reg.* v. *Jones* (7) shews that, in the case of a non-corporate office, there must be something more than mere acceptance. I desire to guard against the notion that in all cases it is necessary that the person elected should exercise the office. In the case of a corporate office the old rule is that the existence of the three circumstances of election, acceptance, and admission is enough. I further agree with the view put forward by Mr. Channell that such a conditional acceptance as was intended by the defendant is not enough to amount to acceptance of an office, especially where, as in this case, the performance of the condition is contrary to law.

(1) Say. 245; and see 2 Bro. P. C. 311.
(2) 5 T. R. 85.
(3) 4 East, 337.
(4) 11 A. & E. 505.
(5) 3 E. & B. 249; 23 L. J. (Q.B.) 133.
(6) Law Rep. 2 Q. B. 55.
(7) 28 L. T. (N.S.) 270.
(8) 18 Q. B. D. 349.
(9) 13 App. Cas. 241.

COLLINS, J. I am of the same opinion, and on the same grounds. 1892

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Order discharged.

Solicitor for relator: *E. H. Baker, for C. Butterfield, Ealing.*
Solicitors for defendant: *Nelson, Barr, & Nelson.*

P. B. H.

THE QUEEN *v.* BAYARD.

1892 *May* 27.

Practice—Criminal Law—Costs—Indictment containing several Counts—Charge of several Misdemeanors—Certiorari—Removal of Indictment—Recognizance—Acquittal on some Counts, Conviction on others—"Acquitted upon the Indictment"—16 & 17 *Vict. c.* 30, *s.* 5.

An indictment containing several counts, charging different misdemeanors, was removed into the High Court by certiorari, the prosecutors entering into a recognizance, under 16 & 17 Vict. c. 30, s. 5, upon condition to pay to the defendant, in case she should be acquitted upon the indictment, her costs incurred subsequent to the removal. The defendant was convicted on some of the counts, and acquitted on others.

On a rule to tax the costs to be paid by the prosecutors to the defendant in respect of the counts on which she had been acquitted:—

Held, that the defendant had not been "acquitted upon the indictment," within the meaning of the recognizance, and therefore was not entitled to costs.

A RULE NISI had been obtained on behalf of the defendant, calling on the prosecutors to shew cause why it should not be referred to one of the masters of the Crown Office, to tax the costs to be paid by the prosecutors to the defendant in respect of the 3rd, 4th, 5th, 6th, and 7th counts of the indictment.

The 1st and 2nd counts of the indictment charged the defendant with narrowing and obstructing a highway by maintaining a wire fence. The 3rd count charged that certain persons had obstructed another highway by erecting a fence and planting grass and trees, and the defendant continued the obstructions. The 4th, 5th, 6th, and 7th counts charged the defendant with obstructing a highway by maintaining a fence and a building, and a pond which had been deepened.

The indictment was removed into the High Court of Justice

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by certiorari, at the instance of the prosecutors, who entered into a recognizance, upon condition that, if the prosecutors should pay to the defendant, in case she should be acquitted upon the indictment, her costs incurred subsequent to the removal of the indictment, the recognizance should be void. (1)

The defendant was tried at the summer assizes for Montgomeryshire, in 1891, when the jury found a verdict of guilty on the 1st, 2nd, and 3rd counts of the indictment, and not guilty on the 4th, 5th, 6th, and 7th.

The verdict on the 3rd count was set aside, and a new trial ordered as to the offence charged in that count. At the second trial the defendant was acquitted.

The defendant's solicitors applied at the Crown Office under Rule 252 of the Crown Office Rules, 1886, for an order to tax the defendant's costs on the 3rd, 4th, 5th, 6th, and 7th counts of the indictment, incurred subsequently to the removal by certiorari. An order was refused on the ground that the defendant had not been acquitted upon the indictment, so as to be entitled to costs.

The rule nisi above referred to was then applied for and obtained.

Loehnis, for the prosecutors, shewed cause. The defendant is not entitled to costs. The right to costs can only be acquired by statute. The statute in question here is 16 & 17 Vict. c. 30, s. 5, under which the recognizance was entered into; and in order to entitle the defendant to costs, the condition of the recognizance must be fulfilled. That condition is to pay the defendant's costs "*in case she shall be acquitted upon the indictment.*" It is impossible to say that she has been acquitted upon the indictment, for the verdict of guilty on the 1st and 2nd counts stands against her.

(1) By 16 & 17 Vict. c. 30, s. 5: "Whenever a writ of certiorari to remove an indictment is awarded at the instance of the prosecutor, the prosecutor shall enter into a recognizance with the condition "that the prosecutor shall pay to the defendant or defendants, in case he or they shall be acquitted, his or their costs incurred subsequent to such removal."

Similar provisions are contained in Rule 30 of the Crown Office Rules, 1886.

[He referred to *Rex* v. *Fieldhouse* (1); *Rex* v. *Downes* (2); *Reg.* v. *Hawdon* (3); *Reg.* v. *Inhabitants of East Stoke* (4).]

F. Marshall, for the defendant, in support of the rule. The defendant has been acquitted upon the indictment, within the meaning of the recognizance, for she has been acquitted on five out of the seven counts, charging separate and distinct offences from the other two, and the rule only asks for costs in respect of the counts on which there was an acquittal. The words of 16 & 17 Vict. c. 30, s. 5, are, "in case he or they shall be acquitted." The case comes within that. The effect of holding that the charges cannot be separated would be to enable a vindictive prosecutor to deprive a defendant of the costs of an expensive prosecution which was utterly unfounded by joining a trivial charge in the same indictment. Here there might have been different indictments.

[He referred to *Myers* v. *Defries* (5); *Castro* v. *Reg.* (6).]

MATHEW, J. The rule must be discharged. An attempt is now made for the first time, contrary to the practice of the Crown Office, to introduce the rules applicable to civil procedure into the criminal law. The power to tax costs in cases where an indictment has been removed by certiorari depends partly on the statute and partly on the recognizance. The Act (16 & 17 Vict. c. 30, s. 5) provides that where a writ of certiorari shall be awarded at the instance of the prosecutor, the prosecutor shall enter into a recognizance with the condition that the prosecutor shall pay to the defendant, in case he shall be acquitted, his costs incurred subsequent to the removal. I am far from saying that the Court may not have a discretion, in cases where application is made for a certiorari, to make a special order with regard to the costs of a particular prosecution. But that is not the question here. In the present case a recognizance has been entered into by the prosecutors with the condition that the prosecutors should pay to the defendant, in case she should be acquitted upon the indictment, her costs incurred subsequent to

(1) 1 Cowp. 325.
(2) 1 T. R. 453.
(3) 11 A. & E. 143.
(4) 6 B. & S. 536; 34 L. J. (M.C.) 190.
(5) 4 Ex. D. 176.
(6) 6 App. Cas. 229.

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the removal of such indictment. That means, acquitted of all the misdemeanors charged in the indictment.

WRIGHT, J. I am of the same opinion for the same reasons, and I rely especially upon the fact that the practice hitherto has been uniform.

Rule discharged.

Solicitors for the prosecution: *Rowcliffes, Rawle & Co., for G. D. Harrison, Welchpool.*

Solicitors for the defendant: *Robbins, Billing & Co., for Williams, Gittins & Taylor, Newtown.*

P. B. H.

C. A.

1892

May 2, 31.

[IN THE COURT OF APPEAL.]

PUGSLEY & CO. *v.* ROPKINS & CO., LIMITED.

County Court—Jurisdiction—Admiralty—Demurrage—Action by Shipowner—Court in District of which Owner of Vessel resides—"Vessel or Property to which the Cause relates"—31 & 32 *Vict. c.* 71, *ss.* 3, 21, *sub-s.* 1, 2—32 & 33 *Vict. c.* 51, *ss.* 1, 2, *sub-s.* 1—51 & 52 *Vict. c.* 43, *ss.* 56, 74.

By the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 21, "proceedings in an Admiralty cause shall be commenced: (1.) In the county court having Admiralty jurisdiction within the district of which the vessel or property to which the cause relates is at the commencement of the proceedings; (2.) If the foregoing rule be not applicable, then in the county court having Admiralty jurisdiction in the district of which the owner of the vessel or property to which the cause relates, or his agent in England, resides, or if such owner or agent does not reside within any such district, then in the county court having Admiralty jurisdiction the district whereof is nearest to the place where such owner or agent resides."

By the County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51, which is to be read as one Act with the Act of 1868), s. 2, jurisdiction is given up to 300*l.*: (1) "As to any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship."

An Admiralty action was commenced by shipowners in the county court having Admiralty jurisdiction, in the district of which they resided, against indorsees of a bill of lading, which incorporated the terms of a charterparty, to recover 40*l.* as demurrage for detention of the ship at the port of discharge. At the commencement of the action the ship was at sea and the cargo to which the bill of lading related was within the district of another county court having Admiralty jurisdiction.

On an application for a prohibition:—

Held (by the Court of Appeal, affirming the decision of the Queen's Bench

Division), that the claim was within sub-s. 1, of s. 2, of the County Courts Admiralty Jurisdiction Amendment Act, 1869; that the cause related to the vessel not to the cargo; that, the vessel being at sea, sub-s. 1, of s. 21 of the County Courts Admiralty Jurisdiction Act, 1868, was inapplicable, and sub-s. 2 applied; and that the action was therefore rightly commenced in the county court having Admiralty jurisdiction in the district of which the shipowners resided.

Held, by the Court of Appeal, that the decision in *The Alina* (5 Ex. D. 227) applies to the case of an action for demurrage upon a bill of lading.

Held, by the Queen's Bench Division, that the circumstance that the claim was by the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 56, within the common law jurisdiction of the county court, so that by s. 74 the action might have been commenced in the Court within the district of which the defendants dwelt or carried on their business, did not prevent the County Courts Admiralty Jurisdiction Acts from applying.

APPLICATION by summons on the part of the defendants, Ropkins & Co., Limited, for a writ of prohibition directed to the judge of the county court of Monmouthshire holden at Newport, and the plaintiffs, Thomas Pugsley & Co., to prohibit them from further proceeding in an action in the said county court, on the ground that the Court had no jurisdiction to hear or determine it.

The plaintiffs were the owners of the steamship *Irwin*, and resided at Newport. The defendants were timber-merchants carrying on business at Wisbeach in Cambridgeshire. The action was commenced on December 18, 1891, in the county court of Monmouthshire at Newport, under the Admiralty jurisdiction of the Court (1), against the defendants, as indorsees of

(1) By the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 3, Admiralty jurisdiction is conferred on certain county courts up to certain specified amounts as to claims for salvage, towage, necessaries, wages, damage to cargo, and damage by collision.

By s. 21: "Proceedings in an Admiralty cause shall be commenced:

(1.) "In the county court having Admiralty jurisdiction within the district of which the vessel or property to which the cause relates is at the commencement of the proceedings.

(2.) "If the foregoing rule be not applicable, then in the county court having Admiralty jurisdiction in the district of which the owner of the vessel or property to which the cause relates, or his agent in England, resides, or if such owner or agent does not reside within any such district, then in the county court having Admiralty jurisdiction the district whereof is nearest to the place where such owner or agent resides."

By the County Courts Admiralty Jurisdiction Act, 1869 (32 & 33 Vict. c. 51, which by s. 1 is to read as one

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a bill of lading, to recover 40*l.* demurrage for two days' detention of the *Irwin* at Wisbeach while unloading a cargo of timber. The bill of lading under which the defendants received the timber provided that the cargo was to be delivered as per charterparty, and by the charterparty the vessel was to deliver the cargo according to the custom of the port of Wisbeach, and the cargo was to be discharged as fast as the vessel could deliver as customary; there was also a provision for demurrage. At the date of the commencement of the action the vessel was away from England. It appeared from an affidavit used on behalf of the defendants, that at the same date the cargo was in the district of the county court of Norfolk (at King's Lynn), which had Admiralty jurisdiction.

Denman, J., referred the summons to the Court.

Arthur Pritchard, for the defendants. In the first place, if the County Courts Admiralty Jurisdiction Acts apply at all, the clause applicable is s. 21, sub-s. 1, of the Act of 1868. This action in substance relates chiefly to the cargo, and therefore the cargo is "property to which the cause relates," within the meaning of sub-s. 1, and the action could have been brought in the county court in the district of which the cargo was: *The County of Durham.* (1) Sub-sect. 2, under which the plaintiffs claim to be entitled to sue at Newport, only applies if sub-s. 1 is not applicable. Therefore the Court at Newport has no jurisdiction.

Secondly, the claim being for not more than 50*l.*, the case comes within the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 56, and therefore, by s. 74 of the same Act, ought to have been brought in the Court in the district of which the defendants dwell or carry on their business, and the Admiralty Jurisdiction Acts have no application to the case: *Rockett* v. *Clippingdale* (2); *The Hero* (3); *The Eden.* (4)

Act with the Act of 1868), s. 2, jurisdiction is given up to 300*l.*: (1.) "As to any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship."

(1) [1891] P. 1.

(2) [1891] 2 Q. B. 293.

(3) [1891] P. 294.

(4) [1892] P. 67.

Joseph Walton, for the plaintiffs.

Sect. 21, sub-s. 1, of the Act of 1868, has no application, because the cause relates to the vessel, not to the cargo. It is an action for damages for the detention of a ship, and it comes within the words of s. 2, sub-s. 1, of the County Courts Admiralty Jurisdiction Act, 1869, "any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship": *The Cargo ex Argos*. (1) Therefore, the case is one in which s. 21, sub-s. 2, of the Act of 1868 applies, because sub-s. 1 does not, and the action is rightly brought in the Newport County Court: *The County of Durham* (2) is an authority in the plaintiffs' favour.

[On the defendants' second point he was stopped.]

Pritchard, replied.

POLLOCK, B. This is an application by the defendants for a prohibition to prohibit the plaintiffs from proceeding with an action in the county court of Monmouthshire holden at Newport, on the ground that that Court has no jurisdiction to entertain the action. The action in question is brought in the Monmouthshire County Court, in the district of which the plaintiffs reside or carry on business, against the defendants, as indorsees of a bill of lading referring to a charterparty, which provided that the cargo was to be delivered according to the custom of the port of Wisbeach. There was a delay of two days in discharging the cargo, and the claim is by the shipowners for demurrage in respect of that delay. It is a claim for not more than 50*l*., so that the amount is within the common law jurisdiction of the county court. The defendants contend that the action ought to be brought, not in the county court of Monmouthshire, in the district of which the plaintiffs reside or carry on business, but in the county court at Wisbeach, where the defendants reside or carry on business, and where the cargo was discharged and the cause of action arose. The case must be decided on the two statutes which give Admiralty jurisdiction to county courts. The Act of 1868 (31 & 32 Vict. c. 71), is the first Act which gives such jurisdiction in certain cases. Sect. 3, sub-s. 1, gives

(1) Law Rep. 5 P. C. 134. (2) [1891] P. 1.

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jurisdiction in claims for salvage where the value of the property saved does not exceed 1000*l.*, or the amount claimed does not exceed 300*l.* Sub-sect. 2 of the same section gives jurisdiction as to claims for towage, necessaries, or wages where the amount claimed does not exceed 150*l.*; and sub-s. 3 gives jurisdiction as to claims for damage to cargo or damage by collision where the amount claimed does not exceed 300*l.* All these cases are claims which were within the old jurisdiction of the Admiralty Court before it was enlarged by statute. Then s. 21 of the same Act allows proceedings in an Admiralty cause to be commenced—"(1.) In the county court having Admiralty jurisdiction within the district of which the vessel or property to which the cause relates is at the commencement of the proceedings." By sub-s. 2, if sub-s. 1 is not applicable, the proceedings may be commenced "in the county court having Admiralty jurisdiction in the district of which the owner of the vessel or property to which the cause relates resides," or in the district of the nearest county court having Admiralty jurisdiction. The jurisdiction of the county court in Admiralty cases is enlarged by the Act of 1869. By s. 2, sub-s. 1, of that Act the jurisdiction is extended to "any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship," and by s. 1 the Act is to be read and interpreted as one Act with the Act of 1868. The result is the same as if s. 3 of the Act of 1868 and s. 2 of the Act of 1869, were parts of the same statute. The claim in the present case is a claim arising out of an agreement made in relation to the use or hire of a ship within the meaning of that section, and it arises out of an agreement made in relation to the carriage of goods in a ship. The vessel was on the high seas at the commencement of the proceedings, and therefore, so far as the vessel is concerned, s. 21, sub-s. 1, of the Act of 1868 could not apply. It is argued on behalf of the plaintiffs that there is a cause of action arising out of a contract for the carriage of the cargo, by which the ship and the owners are bound, and therefore the county court of Monmouthshire is the right Court. I am of opinion that this argument must succeed, and that the right court is the court at Newport in Monmouthshire. It

is a point of some difficulty; but I think this is the right conclusion looking at the history of the Acts. We have been referred to the case of *The County of Durham* (1), in which the owners of a steamship, having commenced an action in personam in the county court within the jurisdiction of which their vessel then was, against the charterers, for breach of an alleged warranty in the charterparty as to the depth of water at the charterers' wharf, whereby the vessel sustained damage whilst at the wharf, which was within the jurisdiction of another county court, the Court held, that as the two Acts of 1868 and 1869 were to be read as one, the language of ss. 3 and 21 of the Act of 1868 was extended so as to include the vessel in an action instituted under s. 2 of the Act of 1869, and that consequently the county court in which the action had been commenced had jurisdiction. The Court, consisting of Sir James Hannen and Butt, J., adopted the view expressed by the county court judge in a written judgment, containing the following passage: "It has been argued that the present is not properly a cause relating to a ship; but I do not agree with that view. The expression 'cause' relating to a ship only differs from cause relating to the use or hire of a ship as the greater differs from the less. If an action on a charterparty which, ex concessis, is an action upon an agreement relating to the use of a ship, is not an action relating to a ship, it seems difficult to admit that an action for towage or wages is an action relating to a ship." (2) If the ship here had been within the district of the Wisbeach County Court, that would have been conclusive of the present case; but under the existing circumstances it has no application.

In support of the defendants' second point, the case of *The Hero* (3) was relied upon. There the owners of a steamship brought an action in personam on the Admiralty side of the county court within the district of which the defendants, charterers of the vessel and consignees of the cargo, carried on their business, for damages for the detention of the vessel in unloading; and the Court held that the county court in which the action was brought had jurisdiction by virtue of s. 74 of

(1) [1891] P. 1. (2) [1891] P. at p. 4.
(3) [1891] P. 294.

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the County Courts Act, 1888 (51 & 52 Vict. c. 43). But it does not follow that because the Court there held that the plaintiffs *might* proceed, under s. 74 of the Act of 1888, in the court in the district of which the defendants carried on their business, therefore the word "may," in s. 74, is to be read as "must," and in all similar cases the court of the place where the defendant resides *must* be selected. That decision, therefore, does not assist the defendants in the present case.

For the reasons I have given, I am of opinion that this application for a prohibition must be dismissed with costs.

VAUGHAN WILLIAMS, J. I have arrived at the same conclusion.

The question is whether the county court at Newport has any jurisdiction. If it has not, the prohibition ought to go. Newport is in the district in which the plaintiffs, the shipowners, reside, and their contention is that the effect of s. 21 of the Act of 1868 is to allow them to proceed in the county court there.

I will deal first with the second point taken on behalf of the defendants, that is, that part of the argument which was based on the County Courts Act, 1888, and the cases of *The Hero* (1) and *The Eden*. (2) I am of opinion that that argument is altogether without foundation. The utmost that those cases decide is that s. 74 of the Act of 1888 is applicable to proceedings in a county court in Admiralty as well as to other proceedings in a county court, and a plaintiff has the option by virtue of that section of proceeding in the court in the district of which the defendant resides; but it does not follow that he *must* proceed in that court.

As to the other point, it is contended on behalf of the plaintiffs, that the county court at Newport has jurisdiction, on the ground that s. 21, sub-s. 1, of the Act of 1868 has no application, and, therefore, by sub-s. 2, the action may be commenced in the county court having Admiralty jurisdiction in the district of which the owners of the vessel to which the cause relates reside.

I am of opinion that this contention is well founded, and that the county court of Monmouthshire has jurisdiction, on the

(1) [1891] P. 294. (2) [1892] P. 67.

ground that the matter to which the cause relates is the ship. The plaintiffs are seeking to enforce a claim arising out of a contract, whereby demurrage was payable if the ship were detained. I am therefore of opinion that s. 21, sub-s. 1, of the Act of 1868 is not applicable, and consequently sub-s. 2 is.

Application dismissed.

P. B. H.

The defendants appealed.

1892. May 31. *Arthur Pritchard*, for the defendants. First, this action is not within the County Courts Admiralty Jurisdiction Amendment Act, 1869, and therefore the county court has no jurisdiction. In the case of *Reg.* v. *Judge of the City of London Court* (1), this Court laid down as a general rule that that Act did not give jurisdiction to the county court in a case where the High Court of Admiralty would have had no jurisdiction. The case of an action on a charterparty was no doubt admitted to be an exception to the rule, because that case was determined by the decision of the Court of Appeal in *The Alina* (2); but it was said that that decision was not to be extended to any other case. In this case the action is on a bill of lading, not on a charterparty.

Secondly, if the county court has jurisdiction in such a case, the action ought to have been brought in the county court of Norfolk, not in the county court of Monmouthshire. The action is brought under the County Courts Admiralty Jurisdiction Amendment Act, 1869, s. 2, sub-s. 1, in respect of a claim arising out of an agreement made in relation to the carriage of goods in a ship. That Act is to be read as one with the County Courts Admiralty Jurisdiction Act, 1868. The 21st section of the County Courts Admiralty Jurisdiction Act, 1868, sub-s. 1, provides that the proceedings shall be commenced in the county court having Admiralty jurisdiction, within the district of which the vessel or property to which the cause relates is at the commencement of the proceedings. Sub-s. 2 of the section is only applicable if sub-s. 1 does not apply. In this case the cause relates to the cargo which was not within the district of the

(1) [1892] 1 Q. B. 273. (2) 5 Ex. D. 227.

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county court of Monmouthshire but within that of the county court of Norfolk. The question in the action is whether the cargo was unloaded with the dispatch stipulated for in the bill of lading. The sole dispute relates to the cargo, there is no dispute as to the ship. Assuming that the cause is to be taken to relate in such a case as this to the ship as well as the cargo, it is contended that the proceedings might be taken either where the ship was, or where the cargo was, if they were within the jurisdiction of a county court having Admiralty jurisdiction. But here the ship was at sea, therefore they ought to have been taken where the cargo was. [He cited also *The County of Durham.* (1)]

Joseph Walton, for the plaintiffs, was not called upon. (2)

LORD ESHER, M.R. Unless the construction put upon s. 2 of the Act of 1869 in the case of *The Alina* (3) be the true construction, there is nothing which gives the county court Admiralty jurisdiction in such an action as this. Though, of course, I may some day be proved to be wrong, I still adhere to the opinion which I expressed in the case of *Reg.* v. *Judge of the City of London Court* (4), to the effect that the decision in *The Alina* (3) was wrong, and was founded on wrong reasoning. Still we are bound by that decision. It had, no doubt, regard to a charter-party; but to say, if we are to obey it, that we can distinguish it from the case of a bill of lading, is too great a refinement for me. As long as the judgment stands, I think it must be taken to be applicable to the case of a bill of lading. Therefore, I think we must take it that, according to that decision, the county court would have Admiralty jurisdiction in this case. That reduces the question to this, viz., assuming that jurisdiction is given to some county court or other, to what county court is jurisdiction given? The action in this case is on a bill of lading in respect of failure to discharge a ship as stipulated in the bill of lading, that incorporated the stipulation of the charterparty, by which it was provided that the ship was to be discharged "as fast as

(1) [1891] P. 1.

(2) The second point taken by the defendants in the Queen's Bench Division was not argued in the Court of Appeal.

(3) 5 Ex. D. 227.

(4) [1892] 1 Q. B. 273.

steamship can deliver as customary." For the present purpose we must take it that the ship was ready to deliver in proper time, but that the shippers failed to take delivery as fast as the ship could deliver. Thereupon the shipowners bring an action. The cause of action is the detention of the ship, not the mode of taking discharge of the cargo. The shippers might take delivery in such a manner as to damage or destroy the cargo. That would be no injury to the shipowners. The cause of action—that is to say, the injury to the shipowners—is the detention of the ship. The mode of taking delivery of the cargo by the shippers is no doubt the cause of the detention of the ship; but the cause of the detention is not the cause of action. The detention itself is the cause of action, and that relates to the ship only. In applying the County Courts Admiralty Jurisdiction Amendment Act, 1869, we have to refer back to the 21st section of the County Courts Admiralty Jurisdiction Act, 1868, which provides in what county court the action is to be brought. That section enacts that "proceedings in an Admiralty cause shall be commenced (1.) in the county court having Admiralty jurisdiction within the district of which the vessel or property to which the cause relates is at the commencement of the proceedings." In applying this language we may leave out the words "or property," for, as I have said, this cause has nothing to do with property other than the vessel. The vessel in this case was on the high seas when the action was brought. So this sub-section cannot apply. If she had been within the district of the county court of Monmouthshire, I think it would have applied. Then, by sub-s. 2, "if the foregoing rule be not applicable," then the proceedings are to be "in the county court having Admiralty jurisdiction in the district of which the owner of the vessel or property to which the cause relates, or his agent in England, resides." In this case sub-s. 1 not applying, because the vessel was at sea, sub-s. 2 is applicable. Therefore the action was rightly brought in the county court of Monmouthshire, and the application for a prohibition was rightly refused.

FRY, L.J. This is an action on a bill of lading brought upon the Admiralty side of the county court of Monmouthshire by

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shipowners residing in Monmouthshire against shippers residing at Wisbeach for detention of the ship at the latter place. At the time when the action was brought the ship was on the high seas, but the cargo was in the district of the county court of Norfolk. Two questions have been raised before us. The first of those questions turns upon the County Courts Admiralty Jurisdiction Amendment Act, 1869. It is whether the claim thus made by the plaintiffs is within s. 2 of the Act, which confers jurisdiction upon county courts having Admiralty jurisdiction in respect of, amongst other subject-matters, "any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship?" Reading those words without any special knowledge of the subject, anyone would say that this claim comes within them. But the question is raised whether the language of the Act must not be limited to such claims as come within the words and were the subject of Admiralty jurisdiction in the case of the Court of Admiralty. The case of *The Alina* (1) decided that this provision applies to the case of a claim upon a charterparty. If that be so, it appears to me clear that it must apply to a claim of a similar description upon a bill of lading. It was said that in the case of *Reg.* v. *Judge of the City of London Court* (2), this Court said that the decision in the case of *The Alina* (1) must be confined to the case of a charterparty, and therefore it would not extend to the case of a bill of lading. I think it obvious that the Court did not mean to draw such a distinction as that, and that it would be quite unreasonable to do so. So much for the question on the Act of 1869.

The second question, which arises upon the Act of 1868, is in what county court the action must be brought? The 21st section of the Act, sub-s. (1), provides that the proceedings shall be commenced "in the county court having Admiralty jurisdiction within the district of which the vessel or property to which the cause relates is at the commencement of the proceedings." That language seems to me to apply to cases in which the Court can say that the cause relates to the vessel, or, alternatively, that it relates to property. Whether it would apply, and if so, what

(1) 5 Ex. D. 227. (2) [1892] 1 Q. B. 273.

its application might be, if a cause related both to the vessel and to property, it is, in my opinion, not necessary now to determine, because I think that in this case the cause relates to the vessel only. It is quite true that a controversy may have arisen as to the mode of taking delivery of cargo; but the claim of the plaintiffs entirely relates to the detention of the vessel and not to any other property. Thus looked at, clearly sub-s. 1 does not apply, and it follows that sub-s. 2 does apply. Therefore, the decision of the Divisional Court was correct.

LOPES, L.J. It appears to me quite clear that this Court never meant in the judgment in *Reg.* v. *Judge of the City of London Court* (1), to which I was a party, to draw any distinction between the case of a charterparty and that of a bill of lading. According to the decision in *The Alina* (2) the county court on its Admiralty side has jurisdiction in the case of a charterparty, and therefore, if that case cannot be distinguished from the case of a bill of lading, it must have jurisdiction in the case of a bill of lading also. So much for the Act of 1869. Then comes the question under the Act of 1868, with which the Act of 1869 is to be read as one Act. For the purpose of that question we have to consider what the cause here is. It is an action for demurrage, i.e., for the detention of the vessel. The sole cause of action is the detention of the vessel. It seems to me, therefore, that the cause relates to the vessel only. The ship was on the high seas at the commencement of the action. Therefore, sub-s. (1) of s. 21, is inapplicable. It follows that sub-s. (2) is applicable. Therefore, the county court of Monmouthshire was the Court which had jurisdiction, and the prohibition was rightly refused.

Appeal dismissed.

Solicitors for plaintiffs: *Botterell & Roche, for Vaughan & Hornby, Newport.*

Solicitors for defendants: *Pritchard & Sons, for Jackson, Hull.*

(1) [1892] 1 Q. B. 273. (2) 5 Ex. D. 227.

E. L.

1892
June 16.

ROLFE *v.* THOMPSON.

Adulteration—Food (and Drugs)—Sample of Milk procured for Analysis—Portion of Sample retained by Inspector—Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 *Vict. c.* 30), *s.* 3.

By s. 3 of the Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), an inspector is enabled to procure "at the place of delivery any sample of any milk in the course of delivery" to the purchaser or consignee, and if he suspect the milk to have been sold contrary to the provisions of 38 & 39 Vict. c. 63, he "shall submit the same to be analysed."

An inspector having taken a sample of milk under the section divided it, retained one part, and submitted the other part to be analysed:—

Held, that he was not bound to submit for analysis the whole of the sample taken by him.

CASE stated by a metropolitan police magistrate under 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49.

It appeared that on February 27, 1892, six churns containing milk arrived at King's Cross Station consigned by the respondent Thompson to one Handsley. The appellant Rolfe, who was the inspector of nuisances for the parish of St. Mary, Islington, took from each of such churns, in the presence of Handsley's foreman, a sample of the milk contained therein, and immediately divided each sample into two parts, one of which he retained and the other of which he delivered to the public analyst for the purpose of analysis. The analyst did not divide the samples received by him. The appellant afterwards issued six summonses against the respondent, under the Sale of Food and Drugs Acts, 1875 and 1879 (38 & 39 Vict. c. 63, and 42 & 43 Vict. c. 30), for selling milk which was not of the nature, substance, and quality demanded by the purchaser. On their coming on for hearing, it was objected on behalf of the respondent that the provisions of s. 3 of the Sale of Food and Drugs Act Amendment Act, 1879, and of s. 15 of the Sale of Food and Drugs Act, 1875, had not been complied with. The magistrate held that each entire sample should, under s. 15 of the Act of 1875, have been submitted to the public analyst and by him divided into two parts, and should not have been divided by the appellant, and he accord-

ingly dismissed the summons, but stated a case for the opinion of the Court. (1)

J. V. Austin, for the appellant. Sect. 15 of the Sale of Food and Drugs Act, 1875, has no application where an inspector or other officer procures a sample of milk in the course of delivery under s. 3 of the sale of Food and Drugs Act Amendment Act, 1879. Sect. 15 is dependent on s. 14, and only applies where the offer of the purchaser of an article to divide it in accordance with s. 14 is refused. It was decided in *Rouch* v. *Hall* (2) that s. 14 did not apply when the sample was procured under s. 3 of the Act of 1879, and therefore s. 15 does not affect the present case. It may, however, be said that the provisions of s. 3 of the Act of 1879 have not been complied with because the inspector did not send the whole amount of milk that he took from each churn. Even supposing that he was wrong in dividing the samples that he took, nevertheless that which he sent to the analyst was a sample of the milk in the churns, and the mere fact that he retained a part of the samples which he took cannot render the milk received from him by the analyst any the less a sample within the meaning of the Acts.

Poland, Q.C., for the respondent. This is a criminal offence, and the Acts relating to it must be construed strictly. It must be admitted, after the decision in *Rouch* v. *Hall* (2), that s. 15 of the Act of 1875 does not apply; but by s. 3 of the Act of 1879 it is provided that any inspector or other officer who procures any

(1) By s. 3 of the Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30): "Any medical officer of health, inspector of nuisances, or inspector of weights and measures, or any inspector of a market, or any police constable, under the direction and at the cost of the local authority appointing such officer, inspector, or constable or charged with the execution of this Act, may procure at the place of delivery any sample of any milk in course of delivery to the purchaser or consignee in pursuance of any contract for the sale to such purchaser or consignee of such milk, and any such officer, inspector, or constable, if he suspect the same to have been sold contrary to any of the provisions of the Sale of Food and Drugs Act, 1875, shall submit the same to be analysed and the same shall be analysed and proceedings shall be taken and penalties on conviction be enforced in like manner in all respects as if such officer, inspector, or constable had purchased the same from the seller or consignor under s. 13 of the Act of 1875."

(2) 6 Q. B. D. 17.

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sample of milk shall submit "the same" to be analysed. The inspector was therefore bound to send to the analyst all that he took from the churns, and since he divided the sample and kept back a portion of it, the conditions precedent to conviction have not been fulfilled. It would open a door to injustice and fraud to allow the inspector to interfere with the samples which he has taken.

GRANTHAM, J. In this case we are of opinion that the decision of the learned magistrate must be overruled. It is perfectly clear that the case of *Rouch* v. *Hall* (1) was not brought to his attention. That case decided that the provisions of s. 14 of the Act of 1875 do not apply where a sample of milk is procured in the course of delivery under s. 3 of the Act of 1879, and it is admitted that s. 15 is so dependent upon s. 14, that that section also can have no application to the present case. But a question still remains, namely, whether the provisions of s. 3 of the Act of 1879 have been carried out. It is a question of fact whether or not "any sample" of the milk was sent to the analyst by the inspector, and in my opinion a "sample" was in fact sent by the inspector to the analyst. I cannot think that the fact that the inspector did not send the whole amount that he took from the milk-churns prevents what he actually did send from being a "sample." Some cases have been put in the course of the argument which shew the fallacy of such a contention. If the inspector in taking the sample were to spill some of it, or if he were to put what he took into a leaky vessel, I think it would be impossible to say that the portion of the milk which reached the analyst ceased to be a sample because it did not comprise all that was taken. So, too, if the inspector were to taste what he took in order to decide whether it ought to be submitted to analysis or not, could it be contended that because he had consumed some portion of it the remainder could not be sent to the analyst as a sample? There seems to me to be no justification for the contention that what was sent to the analyst in this case was not a sample because the inspector did not send the whole amount that he took. I fail to see how that fact makes the amount received by the analyst any the less a sample of the milk.

(1) 6 Q. B. D. 17.

In *Rouch* v. *Hall* (1) the inspector divided the sample that he took into three parts, and the Court did not appear to think that that fact constituted any impediment to the conviction. But, as I have said, *Rouch* v. *Hall* (1) turned on the applicability of the provisions of s. 14 of the Act of 1875. Taking s. 3 of the Act of 1879 by itself, I am of opinion that a sample was sent to the analyst by the inspector, and that the fact that he only sent part of the milk that he took does not prevent it from being a sample. I think, therefore, that the view taken by the learned magistrate was wrong, and that the case must be remitted to him.

CHARLES, J. I am of the same opinion. It is quite plain from the case that the question before the learned magistrate was whether the provisions of s. 15 of the Act of 1875 applied to the present case. The magistrate thought that the section did apply, and dismissed the case on the ground that the provisions of that section had not been complied with. It is clear, however, that the case of *Rouch* v. *Hall* (1) was not brought to his attention, as that case is inconsistent with his decision. Nevertheless, it might be possible to support his decision on other grounds, and we have to see whether, quite apart from s. 15 of the Act of 1875, the conditions prescribed by s. 3 of the Act of 1879 have been complied with. I own that at first I felt considerable doubt about the matter. This is a criminal offence, and, of course, the conditions precedent laid down by the Act must be strictly followed; but I have arrived at the conclusion that in this case a sample of the milk was taken by the inspector and delivered to the analyst. The inspector took a sample from each of six cans of milk: he divided these samples, and sent half of each to the analyst. The half that he sent was, I think, a sample within the meaning of the section. I think, therefore, that notwithstanding the fact that he did not send the whole amount that he took from the cans, the provisions of s. 3 have been complied with, and that this appeal must be allowed.

Case remitted to magistrate.

Solicitor for appellant: *William Lewis.*

Solicitors for respondent: *Wontner & Sons.*

(1) 6 Q. B. D. 17.

1892
Feb. 6.

FILSHIE *v.* EVINGTON.

Adulteration—Milk in course of Delivery under Contract of Sale—Payment of Carriage by Purchaser—"Place of Delivery"—Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 *Vict. c.* 30), *s.* 3.

By the Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), s. 3, certain officers therein named "may procure at the place of delivery any sample of any milk in course of delivery to the purchaser or consignee in pursuance of any contract for the sale to such purchaser or consignee of such milk"; and power is given to submit such sample for analysis, and take proceedings as provided by s. 13 of the Sale of Food and Drugs Act, 1875.

The appellant, who lived at C., contracted with a dairy company for the sale to them of the milk from his dairy, to be delivered at London, or at such other station as the purchasers should from time to time appoint; the carriage of the milk from C. to be paid by the purchasers. The purchasers appointed H. as a station for the delivery of milk under the contract. The appellant consigned milk from C. to the purchasers at H.; immediately on its arrival at the latter station, and before possession was taken of it by the purchasers, a sample was taken by the respondent, which, upon analysis, was found to be adulterated by the addition of water:—

Held, that, notwithstanding the provision for payment of the carriage by the purchasers, H. was the place of delivery of the milk to the purchasers within the meaning of the section; and the appellant was, therefore, rightly convicted of an offence under the Acts.

CASE stated by justices.

An information had been laid by the respondent against the appellant, under s. 3 of the Sale of Food and Drugs Act Amendment Act, 1879 (1), charging him with selling or delivering under contract with the purchaser a quantity of milk which was not of the nature, substance, and quality demanded by the purchaser.

(1) 42 & 43 Vict. c. 30, s. 3: "Any medical officer of health, inspector of nuisances, or inspector of weights and measures, or any inspector of a market . . . . may procure at the place of delivery any sample of any milk in course of delivery to the purchaser or consignee in pursuance of any contract for the sale to such purchaser or consignee of such milk, and such inspector, if he suspect the same to have been sold contrary to the provisions of the Sale of Food and Drugs Act, 1875, shall submit the same to be analysed, and the same shall be analysed and proceedings shall be taken and penalties on conviction be enforced in like manner as if such inspector had purchased the same from the seller under s. 13 of the Act of 1875."

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Under an agreement, which was contained in a printed form and was stated to be the common form of agreement in the milk trade, the appellant had contracted to supply the Farmers' and Cleveland Dairies Company with the whole of his dairy of good new milk of the best quality from May 1, 1891, to March 31, 1892. By the agreement it was provided that the milk should be delivered at London or at such other station as the purchasers by any of their authorized officers or servants might from time to time appoint. The carriage was to be paid by the purchasers. It was admitted that Hull was one of the stations which the purchasers might and did appoint under the contract as a place to which the milk was to be consigned. In the present case the milk had been put in the train by the appellant, the vendor, at Castle Donington, consigned to the purchasers' manager at Hull. On the arrival of the train at Hull station the churns of milk were placed on the platform by the railway officials; and before the consignees had actually taken possession of the milk the inspector took two samples, one of which, upon analysis, proved to be adulterated with 6 per cent. of added water.

It was contended on behalf of the appellant that the place of delivery of the milk was Castle Donington and not Hull; but the justices overruled the objection and convicted the appellant.

Hextall, for the appellant. The conviction was wrong. The section only applies where the samples have been taken at the place of delivery of milk in the course of delivery, and the conditions precedent to the right to institute a prosecution must be strictly observed. The sample was not taken at the "place of delivery" within the meaning of the section. The carriage of the milk from Castle Donington to Hull was to be paid by the purchasers; the milk was at their risk during the journey, and Castle Donington was the place of delivery of the milk to the purchasers.

Montague Lush, for the respondent, was not called upon.

HAWKINS, J. I entertain no doubt about this case; it is clear that the appeal must be dismissed. The contract provides for delivery of the milk at London or certain other places to be

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named by the purchasers; Hull was one of those places, and there can be no doubt that we must take this agreement as one for delivery of the milk at Hull. Let us suppose for one moment an action to recover the price of the milk; it would be necessary to prove a delivery in accordance with the contract; that must have been a delivery at Hull; if the vendor had merely proved an order given at Castle Donington, there would be a perfect answer to an action for the price on the ground that though the milk had been sold it had not been delivered.

WILLS, J. I am of the same opinion.

Appeal dismissed.

Solicitor for appellant: *Fitz Payne, for Clifford & Perkins, Loughborough.*

Solicitors for respondent: *Cunliffes & Davenport, for Dawe, Hull.*

W. J. B.

C. A.

1892

April 30.

[IN THE COURT OF APPEAL.]

NYBERG *v.* HANDELAAR.

Trover and Detinue—Joint Owners of Chattel—Right to Possession in one Co-owner—Conversion by the other Co-owner.

The plaintiff, who was owner of a personal chattel, parted with a half-share in it to another person on an agreement that the plaintiff was to have possession of the chattel until it should be sold. The plaintiff entrusted the chattel to his co-owner for the purpose of its being taken to an auctioneer for sale. The co-owner lodged the chattel with the defendant as security for a debt due from him to the defendant. In an action by the plaintiff to recover the chattel from the defendant:—

Held, that, under the agreement, the plaintiff had a special property in the entire chattel which entitled him to the possession of it and to recover it from the defendant.

APPLICATION of the plaintiff for judgment or a new trial.

The action was brought to recover the value of a half-share in a gold enamel box jointly owned by the plaintiff and one Frankenheim, or a return of the box and damages for its detention. The plaintiff in the year 1889 purchased the box, and afterwards sold a half-share in it to Frankenheim, and it was

agreed between them that the plaintiff should retain possession of the box until it should be sold. At a later period the box was entrusted by the plaintiff to Frankenheim for the purpose of being taken to Christie's Auction Rooms, where it was to be sold. Frankenheim owed the defendant money, and delivered the box to the defendant by way of security for the debt. The plaintiff brought this action, which was tried by A. L. Smith, J., with a jury. The jury found that Frankenheim pledged his half-share in the box with the defendant for value, and the learned judge on further consideration gave judgment for the defendant, on the ground that the plaintiff was not entitled to succeed in trover or detinue, and that the special agreement that the plaintiff and not Frankenheim was to have possession of the box did not do away with the right of property which the latter passed to the defendant.

The plaintiff appealed.

April 28. *W. Willis, Q.C.*, and *Fillan*, in support of the appeal. The plaintiff was entitled to judgment. First, Frankenheim was not a joint owner or tenant in common of the box with the plaintiff in the ordinary sense, but had only a special interest in the proceeds of the sale of it. Secondly, assuming that he was tenant in common, this is not the ordinary case of one co-owner of a chattel having possession of it and pledging his interest only in it. By the terms of the agreement between the plaintiff and Frankenheim, the plaintiff had a right to the possession of, or a special property in, the chattel, analogous to that of a bailee, which entitled him to maintain an action of trover or for detention of the chattel against his co-owner. He only entrusted the possession of it to Frankenheim for a special purpose; and, when it was parted with to the defendant for another purpose, he became entitled to recover possession of it from the defendant. A bailee is entitled to maintain detinue against his bailor, if the latter retakes possession contrary to the terms of the bailment; any special or temporary ownership is enough to support an action of detinue, provided there exists an immediate right to possession. [They cited *Jones* v. *Brown* (1); *Gordon* v. *Harper* (2);

(1) 25 L. J. (Ex.) 345. (2) 7 T. R. 9.

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Roberts v. *Wyatt* (1); *Brierly* v. *Kendall* (2); *Cooper* v. *Willomatt.* (3)]

W. H. Clay, contrà. The agreement between the plaintiff and Frankenheim constituted them co-owners of the box. A general or special property is necessary in order to maintain an action of trover or detinue. It is contended that the agreement between co-owners of a chattel that one of them should have the possession of the chattel for the purpose of selling it is a mere personal agreement not affecting rights and giving no special property in the chattel. An action for breach of the agreement might lie, but not detinue. The plaintiff parted with the possession which he originally had under the agreement, and, having done so, he falls within the general rule that one co-owner of a chattel cannot maintain trover or detinue against his co-owner, unless there has been an ouster by dealing with a chattel in the manner inconsistent with the title of the co-owner. Detinue is founded on a right of property as much as trover, and the person who brings it must have a right to the immediate possession of the chattel founded on a property in it.

W. Willis, Q.C., in reply. The plaintiff was not joint tenant or tenant in common with Frankenheim, because there was no unity of possession between them owing to the agreement that the plaintiff should have exclusive possession.

Cur. adv. vult.

May 7. FRY, L.J. This is a case in which the plaintiff was owner of a gold box, and being such owner, entered into an agreement with Frankenheim that the latter should become owner of one-half of the box, and that the plaintiff should retain possession and have the selling of it. It must be taken, the jury having so found, that Frankenheim parted with his share of the box to the defendant for value.

It appears that, the box having remained for some time in the hands of the plaintiff, he determined to sell it at Christie's Auction Rooms, and for that purpose handed it to Frankenheim, who in turn handed it to the defendant as security for money

(1) 2 Taunt. 268. (2) 17 Q. B. 937.
(3) 1 C. B. 672.

owing. The question is whether, under these circumstances, the plaintiff can maintain an action of detinue for the box.

I adhere to the statement made in the old books of practice, that detinue can be maintained by any person who has the immediate right to possession of personal chattels which are wrongfully detained from him, whether that right arises out of an absolute or a special property. The decision of the Court of Exchequer in *Fenn* v. *Bittleston* (1) is a strong authority to shew that the right to maintain detinue cannot be extended beyond that proposition. That being so, the question resolves itself into this, whether the plaintiff acquired any special property in Frankenheim's half of the box by reason of the agreement made between them, as to the custody of it. There was a special contract, and Nyburg was to have possession of the box until a sale took place, and he was also to have power to sell. Under that agreement there was, in my judgment, a special property in Nyburg for a term which would be either till the sale or for the life of Nyburg defeasible on the sale of the chattel. That special property gave him the right to possession of the chattel, and as he parted with the possession for a limited purpose, and the trust on which he parted with possession was broken by the person to whom he entrusted the chattel, Nyburg was remitted to his immediate right to possession; consequently, as he had a special property and the right to immediate possession, he can maintain detinue. This point appears not to have been presented to A. L. Smith, J.; so that, although we are differing from his judgment, it might have been different had his opinion been taken on this point.

LOPES, L.J. The law of detinue, in my opinion, is that a person entitled to possession of a personal chattel can maintain the action when he has a right to immediate possession arising out of an absolute or special property in the chattel. I have great difficulty in seeing how a person can have a right to the immediate possession of a chattel without having some special property in it. A joint owner of goods cannot maintain an action for the conversion of the goods against his co-owner in respect of any

(1) 7 Ex. 152.

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Lopes, L.J.

act of the latter consistent with his ownership. It follows that the plaintiff could not, in the absence of any agreement as to possession of the box, have recovered it from the defendant. But there was an agreement that he should be entitled to the possession of the box until such time as it might be sold. What happened was that the plaintiff entrusted Frankenheim with the box to take it to Christie's, where it was to have been sold. This Frankenheim did not do, but handed the box to the defendant as security for a debt of his own. This transaction amounted to a bailment to Frankenheim for a special purpose, which he did not carry out, and on failure of the trust the plaintiff's right to immediate possession accrued at once. I dissent, therefore, from the judgment of the Court below, and think the appeal should be allowed.

FRY, L.J. I should add that the Master of the Rolls wishes me to say that he agrees in the conclusion that I have stated and in the reasons that have been given. The appeal will be allowed and judgment entered for the plaintiff.

Appeal allowed.

Solicitors for plaintiff: *White & De Buriatte.*
Solicitors for defendant: *Hepburn & Davison.*

A. M.

[IN THE COURT OF APPEAL.]

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DOBBS *v.* BRAIN AND ANOTHER.

Probate and Administration—Administration Bond—Payment of Legacies out of Estate—Legacy to Minor—Failure to make Provision for Payment—Breach of Condition to well and truly administer—Liability of Sureties—Court of Probate Act, 1857 (20 & 21 *Vict. c.* 77), *s.* 81.

By the terms of an administration bond, the administratrix, to whom a grant of probate with the will annexed had been made, was, among other things, to well and truly administer the personal estate and effects of the deceased, "that is to say, pay the debts of the deceased which he did owe at his decease, and then the legacies contained in the said will . . . ." She got in the estate and paid the debts and the legacies, with the exception of one of 50*l.* bequeathed to a minor. To meet this legacy she handed over 50*l.* to her brother-in-law, who did not pay over the money and could not be found. The residue of the estate was distributed, and none remained in the hands of the administratrix to meet the legacy. In an action against the sureties of the bond, which had been assigned by order of the Court of Probate to a guardian on behalf of the legatee who was still a minor:—

Held, that the payment of the 50*l.* out of the estate having become impossible, there was a breach of the condition of the bond to well and truly administer, which rendered the sureties liable.

APPEAL from a judgment of Pollock, B.

The action was brought against the defendants, as sureties to a bond entered into by them with Lucina Wellington and Hannah Maria Tingle, the administratrixes with the will annexed of the personal estate of Jacob Curtis, deceased, for the due administration of the estate, to recover a legacy of 50*l.* bequeathed by the will to Florence Emily Probert.

It appeared that Jacob Curtis by his will left a legacy of 50*l.* to Florence Emily Probert then and at the date of the trial a minor. No executors were appointed by the will, and administration with the will annexed was granted to two daughters of the deceased, who executed an administration bond which the defendants also executed as sureties. The estate was administered in so far that the debts were paid and the legacies with the exception of the legacy sued for. A sum of 50*l.* was paid to one Allen, a son-in-law of the deceased, who undertook to pay the

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legacy, and lodged the money for a time in a bank. The money was subsequently withdrawn from the bank, and it was not known what had been done with it, nor was it known where Allen was. The residue of the estate was distributed according to the terms of the will, and no part of it remained in the hands of those who were administering the estate. The bond was assigned, by order of the Court of Probate, to the plaintiff, who claimed that the estate had not been duly administered, since the legacy had not been paid to Florence Emily Probert, nor invested for her benefit, although the personal estate of the deceased was more than sufficient for the purpose, and since the estate had been wound up without retaining an amount sufficient to pay the legacy. The defendants alleged that as Florence Emily Probert was a minor the administratrixes were not liable to pay the legacy to her or to her attorney during her minority, and had made no default in respect thereof.

The condition of the bond was that if Lucina Wellington and Hannah Maria Tingle "do, when lawfully called on in that behalf make, or cause to be made, a true and perfect inventory of all and singular the personal estate and effects of the deceased which have or shall come to their hands, possession, or knowledge, and the same so made do exhibit, or cause to be exhibited . . . . and the same personal estate and effects do well and truly administer (that is to say) do pay the debts of the deceased which he did owe at his decease, and then the legacies contained in the said will annexed to the said letters of administration so to them committed, as far as the personal estate and effects will thereto extend, and the law charges thereon, and further do make, or cause to be made, a true and just account of their said administration when they shall be thereunto lawfully required, and all the rest and residue of the said personal estate and effects shall deliver and pay unto such person or persons as shall be by law entitled thereto, then this obligation to be void and of no effect, or else to remain in full force and virtue." (1)

The learned judge was of opinion that no breach of the bond had been proved, and gave judgment for the defendants.

The plaintiff appealed.

(1) Probate Rules, Form No. 16.

May 31. *Danckwerts*, and *Hume Williams*, for the plaintiff. It is contended that there was a breach of the condition of the bond on three grounds: first, that the administratrixes could and ought to have paid the legacy to the infant legatee; secondly, that even if that be not so, they did not duly administer the estate; thirdly, that they did not duly account for the estate. The first two grounds are the most material.

With regard to the first point, there are authorities to shew that payment of the legacy to the infant would be a good payment: *Bilson* v. *Saunders*. (1) In Wentworth's Office of an Executor (14th ed. p. 396), it is laid down that, in case the infant be of the years of discretion, viz. fourteen, payment to him would stand good. Here the infant was over that age. There are several cases in the Court of Chancery where the question was discussed whether the payment of the legacy to the infant's father was good, such as *Dagley* v. *Tolferry* (2) and *Cooper* v. *Thornton* (3); but there are no cases in which it has been held that the legacy cannot be paid to the infant. The only difficulty is that an infant, no doubt, cannot give a quittance; but that relates only to the evidence of the payment; it does not follow that payment to the infant would not be good.

Secondly, assuming that the legacy could not be paid to the infant, there was still a failure duly to administer the estate. The money representing the legacy ought to have been invested. Here the estate of the testator is all gone. The administratrixes never can pay the legacy out of the estate; all they can do is to make good out of other moneys the amount of the estate which they have wasted. The failure duly to administer was a breach of the condition of the bond. It was decided in *Archbishop of Canterbury* v. *Robertson* (4) that under similar circumstances there was a breach of the terms of an administration bond given under 22 & 23 Chas. 2, c. 10. The form of the condition in that bond was somewhat different from that of the condition in the present; but it is contended that the construction must be the same. Under that Act it would appear that the administrator was liable at any moment to be called upon to give a full account of what

(1) Bunb. 240.
(2) 1 P. Wms. 285.
(3) 3 Bro. C. C. 96.
(4) 1 Cr. & M. 690.

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he had done with the estate by any person interested: see *Archbishop of Canterbury* v. *Tappen* (1), and it would seem to follow that he must be ready at any moment to produce the funds. By the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 81, under which this bond was given, every person to whom any grant of administration is committed is to give a bond "conditioned for duly collecting, getting in, and administering the personal estate of the deceased, which bond shall be in such form as the judge of the Court of Probate shall from time to time by any general or special order direct." This bond must be construed with relation to the statute under which it was given. It cannot be that it was intended by the clause commencing "that is to say" to narrow the effect of the previous words, for then the bond would not be in accordance with the statute. There are many cases in which a scilicet has been construed either to be falsa demonstratio or as intended not to restrict what has gone before, but merely as an example of what comes within it: *Smith* v. *Walton* (2); *Stukeley* v. *Butler*. (3) In *Sandrey* v. *Michell* (4) the judges said that the Court of Probate Act, 1857, had made no difference in the object of the bond. The words "pay the legacies" must mean, having regard to the context, pay them out of the estate.

It cannot be that the administratrixes may convert the estate to their own use or pay it away, and that the infant legatee is to take her chance whether they are in funds to pay the legacy when she comes of age. [They also cited *Moyle* v. *Moyle*. (5)]

Bosanquet, *Q.C.*, and *J. A. Foote*, contrà. The sureties cannot be sued till there is a breach of the bond within the terms. The duty of administering is defined by the terms of the bond. The administrator is to pay the debts of the deceased and then the legacies. This legacy cannot be paid till the legatee is of age. Any such payment would be nugatory, and the infant might on coming of age demand to be paid, and the previous payment would be no answer. There is certainly no duty to pay till the time arrives, and there is nothing to shew that the administratrix will not be in a position to pay the legacy. If she does so out of her own

(1) 8 B. & C. 151.
(2) 8 Bing. 235.
(3) Hob. 168, at pp. 171, 172.
(4) 3 B. & S. 405.
(5) 2 Russ. & My. 710.

moneys the legatee will be satisfied just as much as if it were out of the estate. If she does not there would be a breach; but till there is such a breach the sureties cannot be sued. The bond secures to every person entitled that which he ought to receive, and it would be to strain it unduly to make it apply to more than the receipt of this legacy by the legatee in due course. [They referred to *Bolton* v. *Powell.* (1)]

Danckwerts, in reply.

LORD ESHER, M.R. In this case an action has been brought on an administration bond against the sureties, on the ground that those who had to administer the estate have committed a breach of the conditions of the bond, and that the sureties are liable. So far as the ladies are concerned they did not interfere further than to entrust what they had to do to their brother-in-law. He seems to have administered the estate, and among other things he took 50*l.* which he was to pay to a legatee, an infant. I think it clear that he has not paid it. His wife is in England; but he himself has gone to America, and no one knows where he is. Consequently the money entrusted to him is lost to the estate, and the rest of the estate is gone and none is left in the hands of the administratrixes. The bond has been assigned to a proper person that he may sue on it, and the question is whether this action is maintainable against the sureties. That must depend on the true construction of the bond as applicable to the state of things that has occurred. The bond is in a form settled by a judge of the Probate Division under the power conferred on him by the Probate Act of 1857. It was intended to carry out the enactments of the statute, and to compel an administrator to carry out his duty with regard to the persons in whose interest he has to administer the estate—in other words, to carry out the provisions of s. 81 of the Probate Act, 1857. By that section every person to whom any grant of administration shall be committed is to give a bond with one or more sureties conditioned "for duly collecting, getting in, and administering the personal estate of the deceased." Taking the statute alone, how ought these words to be construed? Do

(1) 2 D. M. & G. 1.

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they or do they not include the duty of keeping the estate, after it has been collected and got in, until it is duly administered? In my judgment, it is absurd to say that they do not include that duty, and the intention of the bond is to enforce that duty on the administrator, and to secure that it shall be carried out by having sureties to the bond. The bond ought to be construed so as to carry out the objects of the statute. Turning to the bond, the condition is, that if the administratrixes "do make, or cause to be made, a true and perfect inventory of all and singular the personal estate and effects of the said deceased, which have or shall come to their hands, possession, or knowledge, and the same do exhibit," and so on. If that condition is broken the sureties would be liable; but the bond continues, "and the same personal estate and effects do well and truly administer"; that assumes that the estate has been collected and got in, and that besides the proper inventories and accounts there is to be an administration: I apprehend that must include keeping the estate until it has been duly administered. Then follows a description of the order in which the estate is to be administered. The debts are to be paid and the legacies, so far as the personal estate and effects will extend, and the law charges, and the residue is to be distributed. The necessary meaning of this clause is that that is the order in which the estate is to be administered, and it was not intended to limit the expression "well and truly administer," but to shew the way in which it was to take effect.

If this view is correct, the paying away by an administrator of part of the estate, in such a way that he cannot carry out all his obligations in the order described in the bond, is a breach of the obligation entered into by him to duly administer. Is there any authority in support of this view? I think the case of the *Archbishop of Canterbury* v. *Robertson* (1) is such an authority. It is true that in that case there is in the judgment a statement of fact that the administrator had become bankrupt; but in those parts of the judgment where the law is stated, that fact is not relied on except as evidence that the estate had been got rid of. Whether distributing the estate in some other order

(1) 1 Cr. & M. 690.

than that indicated by the statute would be a breach of the bond, if there were enough to pay every one, need not be decided now. In this case the only point is that there has not been left sufficient of the estate to pay the legacy when it becomes due and payable, admitting that it is not payable at the moment. The case I have already mentioned is an authority for saying that the moment the estate is disposed of in such a way that all the legacies cannot be paid out of it there is a breach of the duty to duly administer, and an assignee of the bond may sue at once, and to hold that he could not recover in such a case as this would, in my opinion, be fraught with danger and in contravention of the intention of the statute.

I come, therefore, to the conclusion that there has been a breach of the obligation under the bond, and that it has been rightly put in force. I differ in this from the decision of the learned judge, and the appeal must be allowed.

FRY, L.J. It is desirable, in the first place, to consider the nature of the bond and the cases to which it applies. The bond is conditioned upon the doing of four things: first, to make a true and perfect inventory of the personal estate and effects of the deceased; second, to administer the estate; third, to make an account of the administration if required; and fourth, to pay the residue to the persons entitled to it. It is with the second of these that we are mainly concerned, and the words are "the same personal estate"—that is, the personal estate of the deceased; "do well and truly administer (that is to say) do pay the debts of the deceased . . . . and then the legacies . . . . as far as the personal estate and effects will thereto extend." The true result of this with regard to legacies is that the administrator will pay them out of the estate of the deceased in due course of administration. I have only one other observation to make on the bond. Though for many purposes it is the same as that which was required to be executed under the statute of 22 & 23 Chas. 2, with regard to payment of the residue, there are directions which do not occur in the present bond. I do not think, however, that the omission throws any light on the matter before us.

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Turning now to the facts of this case, it appears that administration was granted to two daughters of the deceased, but that the property came substantially into the hands of one of them. She set aside 50*l.* to meet the legacy which is now being claimed, and this she afterwards parted with to her brother-in-law; and she paid the debts and the other legacies, and distributed the residue, so that no money relating to the estate is in her control. The estate, therefore, has disappeared, and there is no fund from which the 50*l.* can be forthcoming when the legatee attains her majority. Is it a carrying out in due course the administration of the estate, to distribute the whole property without making provision for the payment of this legacy when the legatee attains the age of twenty-one? The answer to this must be in the negative; and the same answer must, I think, be given to the question whether payment of the legacy by the administratrix out of her own means, when the time to pay it arrives, would be a compliance with the conditions of the bond. Payment under the conditions imposed by the bond has become impossible, and there has been a breach of those conditions.

It has been suggested that, so far as such a payment is concerned, the law knows no distinction between the personal estate of the deceased in the hands of an administrator and the private property of the administrator. I do not agree to this. Though an administrator is the legal owner of both, the former is held in auter droit, and a conversion of it would be a legal wrong. The conclusion we have arrived at is strongly confirmed by the decision in the case of the *Archbishop of Canterbury* v. *Robertson*. (1) The Lord Chief Baron there said (at page 712) that the interpretation put by the Court on the condition to well and truly administer was that, "When the administrator applies and converts to his own use the effects of the intestate, so that those effects are entirely lost to the estate of the intestate, that is such a breach of the condition of the bond by which the administrator undertakes 'well and truly to administer according to law,' as will entitle the next of kin to have the bond put in suit at their instance." That is strictly appli-

(1) 1 Cr. & M. 690.

cable to the present case, where this sum of money has been lost to the estate of the testator.

I have only one other observation to make. It may be said that the reasoning by which we have arrived at our conclusion is defective, on the ground that the infant may die before attaining the age of twenty-one, and that in such case there would be no breach of the condition to pay the legacy. The answer to this objection is that the legacy is vested and not contingent, but that even if it were contingent the same right to have the conditions of the bond carried out would vest in the next of kin on the death of the legatee, and the same breach of the bond would have occurred.

LOPES, L.J. I am of the same opinion. The condition of the bond was to well and truly administer the estate, and, among other things, to pay this legacy of 50*l*. Now the amount was paid to Allen; but no one knows where he is or what has become of the 50*l*. entrusted to him. It is absolutely lost to the estate, the whole of which has been parted with. There has, therefore been a misappropriation of the assets of the testator and a breach of the condition of the bond to well and truly administer his estate. The case that has been referred to confirms this view. The bonds in the two cases are somewhat different in form, but the remarks that have been quoted of Lord Lyndhurst as to the conversion of any part of the effects of the deceased whereby they are lost to the estate apply to the present case. It has been said that there can be no breach of the conditions of the bond till the time for the payment of the legacy arrives. In my opinion this is incorrect, because the duty of the administrator is an immediate one to keep money with which to meet the legacy when the time to pay it arrives.

It has also been argued that the words following the scilicet in the bond control and limit the preceding words. I do not think this is so, but that the subsequent words are an illustration of what a due administration would be. It is also said that providing money out of other funds to pay this legacy when it became due is a compliance with the terms of the bond; but this

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argument cannot prevail, for the condition is to pay the legacy out of the personal estate of the deceased.

I therefore agree that the appeal must be allowed, and judgment entered for the plaintiff.

Appeal allowed.

Solicitors for plaintiff: *Wilkins, Blyth, Dutton, & Hartley.*

Solicitors for defendants: *Prior, Church, & Adams, for Champney & Long, Gloucester.*

A. M.

1892 *Feb.* 12, 13.

IN RE TWEEDALE. EX PARTE TWEEDALE.

Bankruptcy—Fraudulent Preference—Void Bill of Sale—Fresh Bill of Sale given to correct Mistake in original Bill—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 48.

A debtor shortly before his bankruptcy executed a bill of sale by which he assigned his furniture to his wife to secure advances bonâ fide made by her. Having discovered that the security was void in consequence of its including after-acquired property, he executed, immediately before the bankruptcy, a second bill of sale, assigning the same chattels to his wife, with the intention of correcting the error in the first bill; and there was evidence that the debtor believed himself to be under an obligation to give the fresh security:—

Held, that the mere fact that the grantor gave the substituted security in order to correct a mistake in the original bill of sale did not amount in law to an intention to prefer his wife to his other creditors, but negatived the existence of any intention to prefer within the meaning of s. 48 of the Bankruptcy Act, 1883.

APPEAL from a decision of the judge of the county court of Guildford.

The debtor, on April 24, 1891, in pursuance of an oral promise, gave to his wife a bill of sale over his furniture to secure advances previously made by his wife to him; in the following month it was discovered that the bill of sale was void under the decision in *Thomas* v. *Kelly* (1), inasmuch as it included after-acquired property; and on June 4, a second bill of sale was given by the debtor (who had been advised that he was bound to give it) in substitution for the previous one. On June 2 the debtor had issued a circular calling a meeting of his creditors; on June 5 he laid before them a statement of his affairs; and on June 16 a

(1) 13 App. Cas. 506.

receiving order was made upon his own petition, and he was eventually adjudicated a bankrupt. The county court judge held that the debtor gave the second bill of sale with the "solid intention" of making good the mistake, and also held that it was given with the substantial view of preferring the wife; he accordingly held it to be a fraudulent preference, and void as against the trustee in bankruptcy. The wife appealed.

W. Clode, for the appellant. The decision of the county court judge was wrong. The original bill of sale was given in pursuance of a promise by the husband to give security to his wife for the advances made by her; this must mean good security: *Stranks* v. *St. John*. (1) That bill turned out to be invalid, and the second bill was given with the sole object of remedying the defect, and under the bonâ fide belief that the debtor was bound to give it. This really negatives the only ground for suggesting that his intention was to prefer his wife to the other creditors. It is true that the money was advanced prior to, or upon the execution of, the first bill; but the two bills must be looked upon as being one transaction for value, and the previous advance was a good consideration for the second bill; such a transaction cannot be impeached: *In re Hockaday, Ex parte Nelson* (2); *Ex parte Allam, In re Munday*. (3) In such a case equity would have granted relief by rectification of the first bill on the ground of mistake, and it would be immaterial whether the mistake were as to the legal effect of the words used or as to the words themselves—a mistake of law or of fact: *Wake* v. *Harrop* (4); *Stone* v. *Godfrey*. (5) There is no evidence to shew that the true intent of the second bill was to defeat the bankruptcy laws beyond the mere fact of the giving of the bill.

Hansell, (*Macklin*, with him), for the respondent, the trustee in bankruptcy. This is not a case in which equity would have relieved by rectification of the first bill of sale. The intention of the parties in executing that bill was carried out; it was always a part of their intention to include after-acquired property in

(1) Law Rep. 2 C. P. 376.
(2) 55 L. T. (N.S.) 819.
(3) 14 Q. B. D. 43.
(4) 1 H. & C. 202, at p. 204.
(5) 23 L. J. (Ch.) 769.

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IN RE TWEEDALE. EX PARTE TWEEDALE.

the security. It is true that they may have acted under a mistake of law; but even then equity would only interfere so far as to carry out the intention of the parties. In giving the second bill the real intention was to prefer the wife, and equity will not interfere in aid of such an intention. The two bills of sale are wholly independent transactions.

[He cited *Ex parte Foxley, In re Nurse* (1); *In re Lane, Ex parte Gaze* (2); *Ex parte Allam, In re Munday.* (3)]

VAUGHAN WILLIAMS, J. I think that the conclusion of law to which the learned county court judge came was wrong, and that this appeal must be allowed. Of course if he had come to the conclusion merely upon the facts in evidence before him, we ought not to review his decision, for he would be in a better position than ourselves to arrive at a just conclusion upon the facts. In my opinion, however, his findings in fact were in all probability correct; he finds that the bankrupt acted with what he calls the "solid intention" to correct a previous error; and it appears beyond doubt from his judgment that he intended to find that the grantor's object in giving the fresh security was with the solid intention of correcting a mistake in the prior bill of sale which had turned out to be bad. I agree with this view. But the learned county court judge goes on to say that he finds it was also done with the substantial view of giving a preference to an outsider; he does not find this as a fact proved in evidence, but it is an inference which he draws from the fact of the substituted security being given; it is as though he had said, "and therefore with the substantial view of preferring an outsider." Placing this interpretation upon his judgment, I think that he was wrong. I have felt much pressed by the decision in *Ex parte Hockaday, In re Nelson* (4), where the facts were very similar to the present; there a security was discovered to be bad within the decision in *In re Barber, Ex parte Stanford* (5); the difference is merely that in the last-named case the security was void because of the introduction of the words "beneficial owner,"

(1) Law Rep. 3 Ch. 515.
(2) 23 Q. B. D. 74.
(3) 14 Q. B. D. 43.
(4) 55 L. T. (N.S.) 819.
(5) 17 Q. B. D. 259.

while here the original security was void because it included after-acquired property. I think that, under the circumstances, it is impossible to say that the mere fact that the grantor gave the substituted security in order to correct a blunder in the first one compels us to hold that the substitution of a good for a bad bill of sale amounts as a matter of law to an intention to prefer; the intention, in fact, was to correct a mistake, and this negatives the only ground on which the security could be set aside.

COLLINS, J. I am of the same opinion. If the judgment of the learned county court judge is carefully looked at, it seems to me that he has felt no difficulty with regard to the facts; he has found on the facts that the new bill of sale was given to correct a flaw in the old one, and he has assumed that this involves in itself a substantial intention to prefer. There was no evidence which went to shew anything but the admitted desire on the part of the grantor to correct the error in the original security and to substitute a good security for a bad one. Accepting, therefore, the findings of the learned county court judge upon the facts, I think that not only was there no evidence of an intention to prefer, but that such intention was rebutted by the facts themselves. The grantor had given a bill of sale as security for an advance, and both the parties to it intended that security to be a valid one; it turned out, however, that under the decision in *Thomas* v. *Kelly* (1) it was invalid. The grantor was then advised, as appears from the affidavits, that there was a contract or obligation on his part to remedy the defect by granting a fresh bill of sale; he conceived himself to be bound under the circumstances to do so. That was the object of his giving the fresh security; and I entirely concur with my learned brother that such object negatives the existence of an intention to prefer within the meaning of the action.

Appeal allowed.

Solicitors for appellant: *Crowders & Vizard, for Mellersh, Godalming.*

Solicitor for respondent: *R. T. Wragg.*

(1) 13 App. Cas. 506. W. J. B.

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June 2.

[IN THE COURT OF APPEAL.]

IN RE NORTH WALES GUNPOWDER COMPANY.

Company—Winding-up—Appointment of Provisional Liquidator after Winding-up Order — Official Receiver — Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *ss.* 4, 6.

By the Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), s. 4, sub-s. 1: "On an order being made by the Court for winding up a company the officer hereinafter mentioned shall by virtue of his office became the provisional liquidator of the company, and shall continue to act as such until he or another person becomes liquidator, and is capable of acting as such." Sub-s. 2: "The said officer shall be the official receiver, if any, attached to the Court for bankruptcy purposes, or if there is no such official receiver, then an officer appointed for the purpose by the Board of Trade." Sub-s. 4: "If any vacancy occurs in the office of liquidator of a company, the official receiver shall, by virtue of his office, be the liquidator during the vacancy." Sub-s. 5: "The official receiver may be appointed by the Court provisional liquidator of the company at any time after the presentation of the petition, and before a winding-up order has been made";—

Held, that after an order for the winding up of a company has been made, the Court has no power to appoint a provisional liquidator other than the official receiver.

Whether the Court has power to appoint a provisional liquidator other than the official receiver in the interval between the presentation of the petition and the order for winding up, *quære*.

APPEAL from an order of a Divisional Court of the Queen's Bench Division. The North Wales Gunpowder Company was registered as a limited company under the Companies Acts.

On January 23, 1892, a petition was presented in the county court of Carnarvonshire for winding up the company. On February 10, the judge of the county court appointed Mr. Nicholson provisional liquidator until the hearing of the petition. The petition was heard on March 17, when the judge made an order for winding up the company, and continued Mr. Nicholson as provisional liquidator until a liquidator should be appointed.

An appeal from this order was brought by the official receiver to the Divisional Court of the Queen's Bench Division, which was heard by Day and Charles, JJ., on May 5, 1892, when the Court dismissed the petition, but gave liberty to appeal to

the Court of Appeal. The official receiver accordingly again appealed.

Sir R. Webster, A.G., *Ingle Joyce*, and *Muir Mackenzie*, for the appellant. The object of the 4th section of the Act of 1890 was to put an end to the difficulty and expense which had often arisen from the competition in the appointment of provisional liquidators. No one can now be provisional liquidator except the official receiver, and he must continue to act until there have been meetings of the creditors and contributories under s. 6, and a liquidator has been appointed by the Court in his place. It is true that in some cases it has been held that the Court can appoint a provisional liquidator, other than the official receiver, before the winding-up order has been made: *In re Unionist Club* (1); but this has never been sanctioned by the Court of Appeal, and North, J., refused to make such an order in *In re Mercantile Bank of Australia*. (2) There is no instance of a provisional liquidator other than the official receiver being appointed after the winding-up order except in the case of *In re Washington Diamond Mining Co.* (3), where the Court affirmed an order of North, J., winding up the company and appointing a provisional liquidator of the company; but there the question was not raised.

Buckley, Q.C., and *Kenyon Parker*, for the company. The Act of 1890 must be read with the Act of 1862, and the powers of the Court under the Act of 1862, ss. 85, 92, continue unless they are repealed by the later Act. The Court has still power to appoint a provisional liquidator for the purpose of protection as soon as the winding-up petition is presented. The county court judge in the present case did not appoint the provisional liquidator till the winding-up order should be made, but generally; and his powers would continue unless expressly withdrawn until the meetings of creditors and contributories under s. 6 and the appointment of a permanent liquidator by the Court. Sub-s. 5 of s. 4 says that the official receiver *may* be appointed after the winding-up order; but it is not made obligatory: there is nothing

(1) W. N. (1891) p. 64. (2) 36 S. J. 363.
(3) Unreported, April 9, 1892.

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to oust the power of the Court to appoint another person provisional liquidator.

[KAY, L.J. The term "provisional liquidator" appears to be used for the first time in the Act of 1890. In the former Act he is always called "the liquidator provisionally appointed."]

It will be found in very many cases most convenient to appoint some person provisional liquidator who has special knowledge of the business of the company, and not the official receiver, who may have none.

Hugh Fraser, for the official receiver.

LINDLEY, L.J. The point before us is a very narrow one, and I think a very clear one. I do not propose to say anything about the decision in the case of *In re Washington Diamond Mining Co.* (1), which was an application in a debenture-holder's action. The point we have to consider is not involved in that case, and the language of the Act of 1890 is such that that order may have been quite right. I am not prepared to say that it is wrong; I express no opinion upon it. The particular point we have to decide in this case is a very much smaller one, and it is whether, since the Winding-up Act of 1890, a provisional liquidator as distinguished from the official receiver may be appointed after the winding-up order has been made. We have not to consider whether the Court can or cannot appoint a provisional liquidator in the interval between the presentation of the petition and the making of the order. I have my own opinion, but I shall say nothing about it; the question does not arise here. The order appealed from is the order of March 17, which not only directs that this company shall be wound up, which is not complained of, but goes on to continue Mr. Nicholson, who had been appointed provisional liquidator before, as provisional liquidator until some other person is appointed. That is the part of the order which is complained of, and that alone. That narrow point appears to me, I confess, to be beyond controversy, having regard to the clear enactments contained in the Winding-up Act of 1890.

The language used in ss. 85, 86, and 92 of the Companies Act,

(1) Unreported, April 9, 1892.

1862, is very different to that which we find in the Act of 1890. The language is there, "The Court may appoint provisionally an official liquidator," and I attach importance to that because I think it throws a little light on the real truth, that there was a general change of scheme in the Act of 1890. The language is no longer optional. It is no longer optional to have a provisional liquidator appointed after the winding-up. There are officials of the Court called the official receivers, and they are scattered, as we have been told, all over the country. They are persons who under the Act are to be provisional liquidators after the winding-up order, and they are to remain so until other persons are appointed. The object of the change of scheme is obvious enough, and perfectly well known to every one acquainted with windings-up. We can all remember the contest that used often to take place as to who should be liquidator. The object was costs and costs only, and the whole scheme of this Act was to stop that; and it does stop it, at least to the extent with which we are concerned to-day. Sect. 4 of the Act of 1890 is, to my mind, quite clear: "On an order being made by the Court for the winding up of a company, the officer hereinafter mentioned" (that is, without any doubt, the official receiver) "shall by virtue of his office"—so that there is to be no fighting—"become the provisional liquidator of the company, and shall continue to act as such until he or another person becomes liquidator, and is capable of acting as such." There is a distinction drawn there between a provisional liquidator and a liquidator, and we shall find that that distinction is preserved in a later clause. Pausing there for a moment, he is made ex officio by the Act, after the winding-up, the provisional liquidator. That is what the Act says in language too plain for doubt. I pass over clause 2, and I also pass over clause 3, which relates to his security. I do not think "liquidator" there does apply to a provisional liquidator, although he would probably have to give security if he was appointed before the winding-up, unless security was specially dispensed with. Then sub-s. 4 runs thus: "If any vacancy occurs in the office of liquidator of a company the official receiver shall, by virtue of his office, be the liquidator during the vacancy"; and then sub-s. 5 says:

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Lindley, L.J.

"The official receiver may be appointed by the Court provisional liquidator of the company at any time after the presentation of the petition and before a winding-up order has been made." I construe that in the same sense as has been contended for by the company. I do not think that it was the intention of the legislature by that sub-section to enact that the official receiver should in all cases be provisional liquidator before a winding-up order is made. It is to enable the Court, if it thinks fit, to appoint the official receiver. Under ordinary circumstances, the Court would not think of appointing a provisional liquidator; because if they did, he would only have to act for a very short time, but in case of need it might be done. Sect. 5 is of importance, because it deals with facts which are common enough. Official receivers are not trained to carry on every kind of business, and it may be very important in some cases to have some skilled man to manage a business which an official in the Bankruptcy Court is incompetent to do; and there is, therefore, power given by this section to obtain a specially skilled person for the purpose. [The Lord Justice read the section.] If any one except the official receiver can make such an application under the general sections of the Act of 1862, I do not know; but here is special provision for the appointment of a special manager, on the application of the official receiver, where a special manager is required. It is very often required and very often not. Then we come to s. 6, sub-s. 1, which enacts that, where the Court has made an order for winding up a company, the official receiver shall summon separate meetings of the creditors and contributories to determine two things, first, whether they wish to have a liquidator other than the official receiver; and, secondly, whether they want a committee of inspection. They are to be consulted about those matters, and if they do want either, the Court may give effect to such determination; and then comes this, in sub-s. 3: "In case a liquidator is not appointed by the Court, the official receiver shall be the liquidator of the company." I am not prepared to say that the words, "in case a liquidator is not appointed by the Court," are confined to cases where it proceeds upon the request of the meetings. The language is very general, and that language makes me cautious in saying that the Court cannot appoint one

without such request. But the language of the section on this particular point which we have to deal with is so clear and plain that the Court cannot avoid giving effect to it, and therefore it appears to me that the appeal must be allowed, and that that part of the order must be discharged.

BOWEN and KAY, L.JJ., concurred.

Appeal allowed.

Solicitors for the official receiver: *The Solicitors of the Board of Trade.*

Solicitors for the company: *Cartwright & Cunningham, agents for Donnison & Edwards, Liverpool.*

M. W.

Doubted. JUDSON *v.* ELLESMERE PORT EX-SERVICEMEN'S CLUB, LTD. [1948] 1 All E.R. 844.

Followed, Etc., JUDSON *v.* ELLESMERE CLUB. [1948] 2 K. B. 52

WILLIS *v.* WELLS AND OTHERS, TRUSTEES OF THE NEW UNION SOCIETY. 1892 *June* 22.

Friendly Society—Jurisdiction—Dispute between Member and Society—Dispute as to whether a Person is entitled to be a Member—Friendly Societies Act, 1875 (38 & 39 *Vict. c.* 60), *s.* 22.

By s. 22 of the Friendly Societies Act, 1875, "Every dispute between a member, or person claiming through a member or under the rules of a registered society, and the society or an officer thereof, shall be decided in manner directed by the rules of the society."

The plaintiff was expelled from a friendly society, the rules of which directed that disputes between a member and the officers should be decided by justices. He applied for an injunction to restrain the society, its members and officers, from excluding him :—

Held, that the Act and rules applied only to disputes arising between members and the society, and did not include a dispute as to whether a person who had been expelled from the society was entitled to be reinstated, and therefore the Court had jurisdiction to grant an injunction.

Prentice v. *London* (Law Rep. 10 C. P. 679) followed.

APPLICATION by the plaintiff for an injunction to restrain the New Union Society, its members and officers, from excluding him from the meetings and benefits of the society, and from refusing to accept his subscriptions, until the trial of the action, or until further order.

The plaintiff, a shoemaker, had for many years been a member of the New Union Society, which was registered under the Friendly Societies Acts. In November, 1889, the plaintiff became ill and unable to work. In order to obtain assistance from the society during his illness he was obliged by the rules to obtain

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every fortnight a medical certificate of inability to work. He received assistance, and obtained the necessary certificate every fortnight down to and including February 14, 1891. On February 16, finding himself better, he returned to work. By rule 18 of the rules of the society, "If any member after receiving the benefit for one week or more shall find himself able to go to work, he shall procure from his medical attendant a certificate, and give the same to the steward, or forfeit threepence, and receive the benefit due to him according to the number of days." This rule had recently been substituted for a previous rule, which only required a written notice to be given by the member himself. The plaintiff on returning to work gave a written notice, but did not obtain the certificate required by rule 18. He tendered his contributions to the society, and the fine of threepence referred to in rule 18, which were refused. He was fined 14*l.*, and on his refusal to pay this fine was expelled from the society. His solicitors applied to the society to reinstate him, but received no answer. An affidavit by the defendant York, used on the hearing of the application, stated that "as defendants refused to consider plaintiff any longer a member of the society, they thought it best not to enter into any correspondence with his solicitors in the matter."

The application for an injunction was made by summons, which Denman, J., referred to the Court.

J. Scott Fox, for the plaintiff, in support of the application. This is not a dispute between a member and the society or its officers within the meaning of the Friendly Societies Act and the rules of the society (1), and there is nothing in the Act or

(1) By the Friendly Societies Act, 1875 (38 & 39 Vict. c. 60), s. 22: "Every dispute between a member or person claiming through a member or under the rules of a registered society, and the society or an officer thereof, shall be decided in manner directed by the rules of the society, and the decision so made shall be binding and conclusive on all parties without appeal, and shall not be removeable into any Court of law or restrainable by injunction."

By rule 27 of the rules of the New Union Society: "All disputes which may arise between any member or person claiming under or on account of any member and the trustees, treasurer, or other officer of the committee thereof, shall be referred to and decided by justices of the peace."

rules to exclude the jurisdiction of this Court to entertain the plaintiff's application for an injunction: *In re Royal Liver Friendly Society.* (1) The plaintiff ceased to be a member owing to the act of the society in expelling him, and he now seeks to be reinstated. Such a dispute as this is not within the Act and rules: *Prentice* v. *London.* (2) The contention of the defendants that the plaintiff is still a member is inconsistent with their own act in expelling him. The conduct of the society is in violation their own rules, and the plaintiff is entitled to the relief which he seeks.

C. C. Scott, for the defendants. The question as to the merits is immaterial for the purpose of the defendants' point, which is that this Court has no jurisdiction. This dispute is within the Act and rules: *Municipal Building Society* v. *Kent.* (3) The plaintiff's claim is that he never ceased to be a member. He claims as a member, and his complaint is as to the way in which he was treated as a member. *Prentice* v. *London* (2) does not bear out the plaintiff's contention, and the language in the other reports of that case (4) is less favourable to the plaintiff than the language in the report which has been cited.

Scott Fox, was not heard in reply.

GRANTHAM, J. I can entertain no doubt as to what our decision ought to be. The merits of the case have not been fully gone into in argument, so it is unnecessary to decide as to the merits; but, at the same time, I am at a loss to understand how this society can justify their action in fining the plaintiff 14*l.* The question which we have to decide is whether the present proceedings can be justified under the Act and rules. I am of opinion that the decision in *Prentice* v. *London* (2) is directly in point as to this question. No doubt the policy of the Friendly Societies Acts is to limit as far as possible the expenses of litigation in cases connected with friendly societies; but we have no right to limit the right to apply to this Court, unless such right is in terms taken away by statute. The statute does take away in terms the right to apply to this Court in

(1) 35 Ch. D. 332.
(2) Law Rep. 10 C. P. 679.
(3) 9 App. Cas. 260.
(4) 44 L. J. (C.P.) 353; 33 L. T. (N.S.) 251.

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certain cases. For instance, it is common ground that in cases of disputes between members and the society or its officers the cheaper tribunal is to be resorted to. But the question to be decided in the present case is whether the plaintiff is a member of the society or not. I cannot see how the defendants can contend that he is a member, for the plaintiff says that he offered to pay his weekly contributions and the fine of 3*d.* referred to in rule 18; but the defendants treat him as a person outside the society, and he is told that he is no longer a member of the society. The affidavit of the defendant York distinctly states that the defendants refused to consider the plaintiff any longer a member of the society. That being so, the present case cannot be treated as a dispute between the plaintiff as a member of the society and the society. In *Prentice* v. *London* (1) Lindley, J., said: "If the matter in controversy is whether the party is a member or not, that clearly is not a matter of internal arrangement." Lord Coleridge, C.J., said substantially the same, and Brett, J., distinctly said: "A dispute as to whether a party is a member or not clearly is not a dispute between the society and the plaintiff as a member." The judgment of Grove, J., is also to the same effect. I cannot say that, because in some of the other reports of that decision the language may be less strong in the direction which I have indicated, the case is not an authority in favour of the contention put forward on behalf of the plaintiff here.

CHARLES, J., concurred.

Injunction granted.

Solicitors for plaintiff: *Pitman & Sons, for C. W. Lane, Kettering.*

Solicitors for defendants: *Iliffe, Henley & Sweet, for W. Thurnall, Kettering.*

(1) Law Rep. 10 C. P. 679.

P. B. H.

[IN THE COURT OF APPEAL.]

C. A.
1892
March 4, 7, 8.

PICKERING PHIPPS *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

Railway—Traffic Management—Undue Preference—Lower Tolls or Rates—Rival Traders—Access to Competing Lines—Railways Clauses Consolidation Act, 1845 (8 *&* 9 *Vict. c.* 20)—*Railway and Canal Traffic Act*, 1854 (17 *&* 18 *Vict. c.* 31), *s.* 2—*Railway and Canal Traffic Act*, 1888 (51 *&* 52 *Vict. c.* 25), *ss.* 17, 27, 29–55.

The fact that a trader has access to a competing route for the carriage of his goods may be taken into consideration by the Railway Commissioners or the Court in deciding whether lower tolls or rates charged to such trader by a railway company constitute an undue preference within the meaning of the Railway and Canal Traffic Acts, 1854 and 1888.

Budd v. *London and North Western Ry. Co.* (4 Ry. & Can. Cas. 393; 36 L. T. (N.S.) 802; 25 W. R. 752) must be considered as no longer law.

Harris v. *Cockermouth and Workington Ry. Co.* (3 C. B. (N.S.) 693), *Denaby Main Colliery Co.* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (14 Q. B. D. 209; 11 App. Cas. 97, and *London and North Western Ry. Co.* v. *Evershed* (3 App. Cas. 1029) discussed and explained.

THIS was an appeal against so much of an order of the Railway Commissioners as dismissed an application made by the executors and trustees of the late Mr. Pickering Phipps, an owner of iron furnaces at Duston, for an order enjoining the London and North Western Railway Company to desist from giving undue and unreasonable preference or advantage to the owners of iron furnaces at Butlins and Islip in respect of charges for the conveyance of pig iron to the South Staffordshire markets.

The 2nd section of the Railway and Canal Traffic Act, 1854, enacts that no railway company "shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The effect of the 27th and 29th sections of the Railway and Canal Traffic Act, 1888, is shortly as follows:—

By s. 27, first, whenever it is shewn that any railway company

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charge one trader or class of traders, or the traders in any district, lower tolls, rates, or charges, for the same or similar merchandise or services, than they charge to other traders or classes of traders, or to the traders in another district, or make any difference in treatment in respect of such traders, the burden of proving that such lower charge or difference in treatment does not amount to an undue preference is to lie on the railway company; and, secondly, in deciding whether a lower charge or difference in treatment amounts to an undue preference, the Court, or the Commissioners, may, so far as they think reasonable, in addition to any other considerations affecting the case, take into consideration whether such lower charge or difference in treatment is necessary for securing in the interests of the public the traffic in respect of which it is made, and whether the inequality cannot be removed without unduly reducing the rates charged to the complainant.

By s. 29, any railway company may, for the purpose of fixing their rates for the carriage of merchandise on their railway, group together any number of places in the same district situated at various distances from any point of destination or departure of merchandise, and charge a uniform rate in respect thereof, provided that the distances are not unreasonable and no undue preference is created.

The sidings of the Duston furnaces were situated on the London and North Western Railway Company's line at a distance of about sixty miles from Great Bridge, one of the pig iron markets to the westward. The sidings of the Butlins and Islip furnaces were situated on the same line to the east of the Duston furnaces, and at a distance from the market as to Butlins of about seventy-one miles, and as to Islip of about eighty-two miles. Duston was dependent for its railway carriage on the London and North Western Company alone, but Butlins and Islip had both of them access not only to the London and North Western, but also to the Midland Railway. The branch lines on which the Butlins and Islip sidings were situate united at a point to the westward, so that they were nearly equidistant from the western markets. The London and North Western Railway Company had, for charging purposes, grouped Butlins and Islip

together; and although they carried the Islip pig iron eleven miles further than the Butlins, they made the same charge from both those places. The Midland Railway also charged the same rate and the same total charge per ton for the carriage from Butlins and Islip.

The London and North Western Railway Company, who carried the Butlins pig iron eleven miles further and the Islip pig iron twenty-two miles further than the Duston pig iron, charged Butlins 0·95*d.* per ton per mile, and Islip 0·84*d.* per ton per mile, while they charged Duston 1·05*d.* per ton per mile; so that the total charge per ton of pig iron from Duston to the western markets was 5*s.* 2*d.*, while the total charge per ton from either Butlins or Islip was 5*s.* 8*d.* for the same class of merchandise.

The allegation on the part of the plaintiffs was that to charge for the carriage of pig iron from Butlins and Islip to the market only 6*d.* more than for the carriage from Duston was, having regard to the difference of distance, an undue preference by the company in favour of Butlins and Islip as compared with Duston; and they brought this application before the Railway Commissioners under the 2nd section of the Railway and Canal Traffic Act, 1854.

The case made by the company was that the comparatively lower rates charged to Butlins and Islip were forced upon them by the competition of the Midland Railway Company; that the lower charge was made bonâ fide, and was, in the terms of s. 27 of the Act of 1888, "necessary for the purpose of securing in the interests of the public the traffic in respect of which it was made"; that there was still a difference of 6*d.* a ton in favour of the plaintiffs, and that the plaintiffs had not been injured by the rates charged to Butlins and Islip. And they produced evidence to shew that the competition in the South Staffordshire market was such that a difference of 6*d.* a ton, or even less, in the price of iron of the same quality, would often be enough to secure a contract.

The Railway Commissioners (Wills, J., Sir Frederick Peel, and Viscount Cobham) held that the London and North Western Railway Company in fixing the rates in question were entitled to take into account the circumstance that Butlins and Islip had

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access to another line of railway which was in competition with their own, and that no sufficient case of undue preference had been made out against them.

The plaintiffs appealed.

1892. Mar. 4. *Sir H. James, Q.C., Littler, Q.C., Percy Gye,* and *Waghorn,* for the appellants. The Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 2, forbids any undue preference; and the Railway and Canal Traffic Act of 1888 (51 & 52 Vict. c. 25), s. 27, sub-s. 1, enacts that whenever it is shewn that a railway company charge the traders in any district lower rates for the same or similar services than they charge to other traders, the burden of proving that such charge does not amount to an undue preference shall lie on the railway company. In the present case the company have not discharged themselves of this burden of proof; they have shewn no reasonable ground for charging higher rates to and from Duston than to and from Butlins and Islip. The power of grouping together places in the same district which is given by the 29th section of the last mentioned Act does not affect this question, and it was not relied on before the Commissioners. The only real ground on which the company rely is the fact that at Butlins and Islip the company are in competition with the Midland Railway Company, and they fear that by making a higher charge they would lose the traffic altogether. But that is not a sufficient ground for giving the traders in that district a preference. It is true that in s. 27, sub-s. 2, of the Act of 1888, it is provided that the Commissioners may take into consideration whether the difference in charge "is necessary for the purpose of securing in the interest of the public the traffic in respect of which it is made." The company, however, are seeking, not the interest of the public, but their own benefit. There is no evidence that the public will be injured by the traffic being taken by the Midland Railway Company, even if that result were to follow. The appellants are entitled to the material advantage they possess of greater proximity to the western market, and the company are acting unfairly to them to deprive them of it by making a difference in the rates: *London and North Western Ry. Co* v. *Ever-*

shed (1); *Budd* v. *London and North Western Ry. Co.* (2); *Denaby Main Colliery Co.* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (3).

A difference of mileage rate is a difference of treatment, and directly a difference of treatment for similar services is shewn, the onus is upon the company to justify it. It has been decided that the threat of competition is no justification: *Harris* v. *Cockermouth and Workington Ry. Co.* (4), and the same principle applies to competition itself: *Budd* v. *London and North Western Ry. Co.* (2)

[LORD HERSCHELL. *Harris* v. *Cockermouth and Workington Ry. Co.* (4) was not a case of existing competition to be dealt with for the purpose of getting traffic.]

The case shews that a railway company must have regard to the interests of the public as well as their own, and may not make bargains whereby one person is benefited and another injured. Though competition may be a circumstance to be taken into account, there is no case in which competition, by itself, without any suggestion of a public need, is a justification.

[LORD HERSCHELL. Is not competition and the lower rates arising therefrom a matter of public interest?]

It is not to the public interest that one trader should be so favoured as to destroy another. The company have produced no evidence to shew that the further sum of 6*d.* charged from Butlins and Islip is a fair equivalent for the additional service rendered; and as the onus of shewing that there was no undue preference is thrown on the company, and they have failed to discharge it, there was nothing before the Railway Commissioners on which they could properly adjudicate.

[Upon the question of who was entitled to complain with regard to passenger traffic, they referred to *Hozier* v. *Caledonian Ry. Co.* (5), and *Brown* v. *Great Western Ry. Co.* (6)]

(1) 2 Q. B. D. 254; 3 Q. B. D. 134; 3 App. Cas. 1029.

(2) 4 Ry. & Can. Ca. (Bro. & Mac.) 393; 36 L. T. (N.S.) 802; 25 W. R. 752.

(3) 3 Ry. & Can. Ca. (Nev. & Mac.) 426; 14 Q. B. D. 209; 11 App. Cas. 97.

(4) 3 C. B. (N.S.) 693; 1 Ry. & Can. Ca. (Nev. & Mac.) 97.

(5) 17 Sess. Ca. 302; 1 Ry. & Can. Ca. (Nev. & Mac.) 27.

(6) 9 Q. B. D. 744.

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[LINDLEY, L.J., referred to *Merry and Cunninghame* v. *Glasgow and South Western Ry. Co.* (1).]

Sir R. Webster, A.G., Cripps, Q.C., and *Ernest Moon*, for the respondents. Grouping and undue preference are mere questions of fact, depending on the matters proved in such case; and the point of law for the decision of the Court is whether the element of competition must be excluded from questions of this character. It is not necessary for the respondents to contend that competition alone would justify any and every variation of the charge; but such competition is an element which may be taken into consideration in determining whether any particular case of preference is undue or unreasonable: *Palmer* v. *London and South Western Ry. Co.* (2); *Denaby Main Colliery Co.* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (3); *Skinningrove Iron Co.* v. *North Eastern Ry. Co.* (4).

The extent to which the Commissioners have taken it into consideration is immaterial, for the question whether they have given too much or too little weight to it, is a question of fact upon which there is no appeal to this Court.

No Court has ever held that competition must be excluded from consideration.

On the contrary, the authorities, so far as they go, are in favour of the argument that competition is an element which must be taken into consideration. The judgments in *Ransome* v. *Eastern Counties Ry. Co.* (5), *Harris* v. *Cockermouth and Workington Ry. Co.* (6), *Garton* v. *Bristol and Exeter Ry. Co.* (7), and *Liverpool Corn Traders' Association* v. *London and North Western Ry. Co.* (8), all contain expressions in support of this.

The decision in *London and North Western Ry. Co.* v. *Evershed* (9) does not apply to the present question. That case turned

(1) 4 Ry. & Can. Ca. (Bro. & Mac.) 383.

(2) Law Rep. 1 C. P. 588; 1 Ry. & Can. Ca. (Nev. & Mac.) 243.

(3) 3 Ry. & Can. Ca. (Nev. & Mac.) 426; 14 Q. B. D. 209; 11 App. Cas. 97.

(4) 5 Ry. & Can. Ca. (Bro. & Mac.) 244.

(5) 1 C. B. (N.S.) 437; 1 Ry. & Can. Ca. (Nev. & Mac.) 63, 71.

(6) 1 Ry. & Can. Ca. (Nev. & Mac.) 97, 103, 104.

(7) 6 C. B. (N.S.) 639; 1 Ry. & Can. Ca. (Nev. & Mac.) 218, 225, 226.

(8) [1891] 1 Q. B. 120; 7 Ry. & Can. Ca. (Bro. & Mac.) 125, 134.

(9) 3 App. Cas. 1029.

upon the equality clause (s. 90) of the Act of 1845, and little or nothing was decided as regards s. 2 of the Act of 1854. The later case, on the same point, of *Rhymney Ry. Co.* v. *Rhymney Iron Co.* (1) only carries out the principle of the *Denaby Main Colliery Co.* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (2), viz., that an action cannot be brought for a breach of the regulations under the undue preference clauses in the Acts of 1854 and 1888. As to *Budd* v. *London and North Western Ry. Co.* (3), if it is still law (and the respondents contend that it is not), it is distinguishable, because here the rates complained of are competing rates to which the respondents have to conform, and the appellants are not suffering damage as the plaintiff there was, and also upon the ground that in that case, with regard to two sets of traffic passing over the same line, the company were charging less for goods taken the whole way from Swansea to Liverpool than they were charging to Budd, whose works were on the same line and twelve miles nearer to Liverpool; so that the case was within the equality clauses, and identical in principle with *Evershed* v. *London and North Western Ry. Co.* (4)

It has been contended that the Railway Commissioners had before them in this case no relevant evidence sufficient to enable them to find that the onus of proof thrown on the railway company by the 27th section of the Act of 1888 had been discharged. But the evidence shews that the competition in the western iron market is so keen that the total difference of 6*d.* per ton in favour of Duston is sufficient in many cases to secure a contract where the iron is of the same quality.

Again, a difference of mileage rates is not of itself enough to cast upon the company the burden of proof that it is not an undue preference; the difference of mileage must, under s. 27 of the Act of 1888, be such as, having regard to the words "for the same or similar merchandise," or "services," looking at the circumstances, shews primâ facie a preference to one class of traffic over another. Mileage rate alone is not a test of

(1) 25 Q. B. D. 146.

(2) 3 Ry. & Can. Ca. (Nev. & Mac.) 426; 14 Q. B. D. 209; 11 App. Cas. 97.

(3) 4 Ry. & Can. Ca. (Bro. & Mac.) 393; 36 L. T. 802; 25 W. R. 752.

(4) 2 Q. B. D. 254; 3 Q. B. D. 134; 3 App. Cas. 1029.

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preference. There are certain expenses which are constant whatever distance goods are taken. There are the initial charges at the starting of the train, and the terminal charges where the train stops. The appellants' goods are taken to the market for 6*d.* a ton less than those from Butlins and Islip, and they have not shewn that this is not a fair difference of charge, or an undue preference or disadvantage, or that it spoils their market, or that they have sustained any injury thereby.

[As to passenger traffic, they referred to *Toomer* v. *London, Chatham and Dover Ry. Co., and South Eastern Ry. Co.* (1).]

Sir Henry James, in reply.

Cur. adv. vult.

March 8. LORD HERSCHELL stated the facts of the case, and remarked that no doubt the fact that the Midland charged the same amount for the carriage from Butlins and Islip had been one element, and perhaps the main element, in determining the London and North Western Railway Company also to make the same charge from Butlins and Islip; because it was obvious that, unless this were done, the Islip traffic would go by the other railway. [His Lordship then continued:] The application is made under the 2nd section of the Railway and Canal Traffic Act, 1854, which provides that: "No railway company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatever, nor shall any such company subject any particular person or company, or particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." The question, therefore, which the tribunal, whether it be the Court or the Commissioners, before whom such a question comes, has to determine is whether an undue preference or advantage is being given, or whether the one party is being unduly prejudiced or put to a disadvantage as compared with the other.

I think it is clear that the section implies that there may be a preference, and that it does not make every inequality of charge an undue preference.

(1) 3 Ry. & Can. Ca. (Nev. & Mac.) 79.

Of course, if the circumstances so differ that the difference of charge is in exact conformity with the difference of circumstances, there would be no preference at all. But, as has been pointed out before, what the section provides is that there shall not be an undue or unreasonable preference or prejudice. And it cannot be doubted that whether in particular instances there has been an undue or unreasonable prejudice is a question of fact. In *Palmer* v. *London and South Western Ry. Co.* (1), Erle, C.J., said: "I beg to say that the argument from authority seems to me to be without conclusive force in guiding the exercise of this jurisdiction; the question whether undue prejudice has been caused, being a question of fact depending on the matters proved in each case." In *Denaby Main Colliery Co.* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (2), when it was before the Court of Appeal, not in the action brought by the Denaby company against the railway company, but on an appeal arising out of the proceedings before the Railway Commissioners, Lord Selborne, then Lord Chancellor, said at p. 441: "They gave a decided, distinct, and great advantage, as it appears to me, to the distant collieries. That may be due or undue, reasonable or unreasonable, but under these circumstances is not the reasonableness a question of fact? Is not it a question of fact and not of law whether such a preference is due or undue? Unless you could point to some other law which defines what shall be held to be reasonable or unreasonable, it must be and is a mere question, not of law, but of fact."

The Lord Chancellor there points out that the mere circumstance that there is an advantage does not of itself shew that it is an undue preference within the meaning of the Act, and further that whether there be such an undue preference or advantage is a question of fact, and of fact alone. No rule is given to guide the Court or the tribunal in the determination of cases or applications made under the 2nd section of the Act of 1854. The conclusion is one of fact, to be arrived at looking at the matter broadly and applying common sense to the facts that are proved. I quite agree with Wills, J., that it is

(1) Law Rep. 1 C. P. 593; 1 Ry. & Can. Ca. 243.
(2) 3 Ry. & Can. Ca. 426.

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impossible to exercise a jurisdiction, such as is conferred by this section by any process of mere mathematical or arithmetical calculation. When you have a variety of circumstances differing in the two cases, you cannot say that such a difference of circumstances represents or is equivalent to such a fraction of a penny difference of charge in the one case as compared with the other. A much broader view must be taken, and it would be hopeless to seek to decide a case by any attempted calculation. I should say that the decision must be arrived at broadly and fairly, looking at all the circumstances of the case, that is looking at all the circumstances which are proper to be looked at; because, of course, the very question in this case is whether a particular circumstance ought or ought not to be considered; but keeping in view all the circumstances which may legitimately be taken into consideration, then it becomes a mere question of fact. From a decision upon a question of fact there is no appeal to this Court, and therefore in order to shew that we have jurisdiction in any way to review the determination of the Railway Commissioners, it must be established first of all that they have made a mistake in point of law.

It is sought to establish that in this way. It is said that by s. 27 of the Act of 1888, which amended the Railway and Canal Traffic Act to which I have been alluding, it is provided that whenever it is shewn that any railway company charges one trader or class of trader for the same or similar merchandise, lower tolls, rates or charges than it charges other traders or classes of traders, then the burden of proving that such lower charge or difference in treatment does not amount to an undue preference shall lie on the railway company. Of course that does not alter the law in the least. It leaves undue preference or undue prejudice exactly what it was under the section of the old Act; but it does make the proof of certain facts primâ facie evidence that there has been an undue preference. Without for a moment determining that such is the proper conclusion to be arrived at ultimately, I will assume that the appellants, the applicants below, established that there had been a difference of charge or rate for similar merchandise—namely, pig iron—as between the two traders, by proving that the mileage

rate charged from Duston was a higher mileage rate than was charged for the carriage of pig iron from either Butlins or Islip, and that this threw upon the railway company the obligation of shewing that the difference did not constitute an undue preference. The appellants then put their case in this way. They say no evidence was given to shew that the difference of mileage rate, which was represented by charging only 6*d.* more to Butlins and Islip than was charged to Duston, was a fair equivalent for the difference of service rendered, and that inasmuch as the onus was thrown upon the railway company of shewing there was no undue preference, and they failed to discharge it, there was nothing upon which the Railway Commissioners could properly act in determining the case in favour of the company. The railway company were required to give particulars of the circumstances affecting the traffic of the appellants, and of the other furnaces, on which they relied as shewing the inequality did not constitute an undue and unreasonable prejudice of the appellants. After pointing out the position which the other furnaces occupied with reference to the Midland Company, to which I shall have to advert presently, they stated that the rates from the appellants' furnaces were 6*d.* less than the rates from the Butlins furnaces, and that part of the rates charged to the appellants and the other furnace owners represented charges and expenses which are constant, whatever distance the traffic may be conveyed. Therefore, what they call attention to as their ground for alleging that there was no undue preference, is this, that mileage rate is not and cannot be alone the test, that where a train is started or taken from one point to another, there are certain initial charges, and certain charges at the other end, I will not call them terminal charges, because that is a word used to describe different things, and the use of it often gives rise to misunderstanding and dispute, but certain initial charges, and certain terminating charges which are constant whatever distance the train has travelled, and that before comparing the mileage rate you must in each case deduct those initial and terminating charges, and then, and then only, will the comparison be a fair one.

Now, dealing with the matter in relation to Butlins alone for

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the moment, can it be said that the Railway Commissioners were not entitled to take that circumstance into consideration, and looking at the distance, and looking at the difference of charge, to say that it was not established to their satisfaction that there was undue preference inasmuch as the railway company had pointed to circumstances which led them to the conclusion that there was no reason for saying otherwise than that the 6*d.* fairly represented the difference of charge which might be made without constituting any undue preference or any undue disadvantage? It was on that ground distinctly on that part of the case, so far as the mere difference of charge to Butlins was concerned, that Wills, J., proceeded in his judgment. What he said may be shortly put thus: "It is true that if you try it merely as a matter of mileage it is about a halfpenny as compared with one penny for the distance travelled, but when you eliminate from the charge those constant charges at both ends which must always exist whatever the distance, when you consider the longer lead there is in the one case than the other, and when you consider the necessities of the case which are brought about by the active competition of the Midland—putting all those things together, the difference is not nearly large enough to render it either necessary or desirable that this Court should interfere." I cannot myself say that it was not open to the Commissioners upon a review of those considerations to come to the conclusion that, even if the difference of mileage rate afforded a primâ facie case which required an answer, yet that the considerations to which I have alluded were matters of which they had judicial and general knowledge, and that they were capable of judging whether, having regard to these, a case of undue preference had been made out.

That would be sufficient to determine the case if the question were only one of undue preference as between the Duston furnace and the Butlins furnace, because I think it would be impossible to say that there was no evidence and that there were no circumstances which the tribunal could take into consideration. Once admit that there are, and then it becomes a mere question of fact, and we have no power to say whether the Commissioners were right or wrong. But as regards the differences between

Duston and Islip, which, although eleven miles further from the market, the point of destination, was charged the same as Butlins, the Court below proceeded upon another ground. They took into consideration the local position of the Islip and the Butlins furnaces in relation to their access to the Midland Railway Company, and the consequent competition between the Midland and the London and North Western, and to the fact that the Midland made a particular charge both from Butlins and Islip, and that the London and North Western Railway Company could not expect to get the traffic from Butlins and Islip except by making the same charge, and that taking this into account, the London and North Western Railway Company might properly group Butlins and Islip for the purposes of traffic, and that their doing so was not, under the circumstances, grouping together two places which were unreasonably distant within the meaning of the 29th section of the Act of 1888, nor were the places grouped together so as to create an undue preference.

Now, there is no doubt that in coming to that determination the Court below did have regard to the competition between the Midland and the London and North Western, and the situation of these two furnaces which rendered such competition inevitable. If the appellants can make out that in point of law, that is a consideration which cannot be permitted to have any influence at all, that those circumstances must be rigidly excluded from consideration, that they are not circumstances legitimately to be considered, no doubt they establish that the Court below has erred in point of law. But it is necessary for them to go as far as that in order to make any way with this appeal, because once admit that to any extent, for any purpose, the question of competition can be allowed to enter in, whether the Court has given too much weight to it or too little becomes a question of fact and not of law.

The point is undoubtedly a very important one, and, I believe, comes now for the first time for decision before the Court of Appeal, though dicta are to be found upon the subject to which I will allude presently, and it has more than once been glanced at in cases which have come before the Courts. I propose to say what I have to say first upon the Act of Parliament itself,

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without regard to authority, considering afterwards whether the authorities point at all to a different conclusion. As I have already observed, the 2nd section of the Act of 1854 does not afford to the tribunal any kind of guide as to what is undue or unreasonable. It is left entirely to the judgment of the Court on a review of the circumstances. Can we say that the local situation of one trader, as compared with another, which enables him by having two competing routes to enforce upon the carrier by either of those routes a certain amount of compliance with his demands, which would be impossible if he did not enjoy that advantage, is not among the circumstances which may be taken into consideration? I am looking at the question now as between trader and trader. It is said that it is unfair to the trader who is nearer the market that he should not enjoy the full benefit of the advantage to be derived from his geographical situation at a point on the railway nearer the market than his fellow trader who trades at a point more distant; but I cannot see, looking at the matter as between the two traders, why the advantageous position of the one trader in having his works so placed that he has two competing routes is not as much a circumstance to be taken into consideration as the geographical position of the other trader, who, though he has not the advantage of competition, is situated at a point on the line geographically nearer the market. Why the local situation in regard to its proximity to the market is to be the only consideration to be taken into account in dealing with the question as a matter of what is reasonable and right as between the two traders, I cannot understand. Of course, if you are to exclude this from consideration altogether, the result must inevitably be to deprive the trader who has the two competing routes of a certain amount of the advantage which he derives from that favourable position of his works. All that I have to say is that I cannot find anything in the Act which indicates that when you are left at large, for you are left at large, as to whether as between two traders the company is shewing an undue and unreasonable preference to the one as compared with the other, you are to leave that circumstance out of consideration any more than any other circumstance which would affect men's minds. I should have said so, and I do say so,

upon the Act of 1854, and I find nothing in the Act of 1888 to exclude any such consideration, if it is not excluded by the Act of 1854.

The Act of 1888, by the 2nd sub-section of s. 27, provides that in deciding whether a lower charge amounts to an undue preference the Court or the Commissioners may, so far as they think reasonable, in addition to any other consideration affecting the case, take into consideration the matter to which I shall refer in a moment. I pause here to say that this is only an empowering section. It empowers them to take certain things into consideration, in addition to any other considerations affecting the case. It leaves, therefore, still to be taken into account, all that was to be taken into account under the Act of 1854, but it says they may, as far as they think reasonable, take into consideration whether such lower charge or difference of treatment is necessary for the purpose of securing, in the interests of the public, the traffic in respect of which it is made, and whether the inequality cannot be removed without unduly reducing the rates charged to the complainant.

Now, I think that the element with which the Court has in the present case to deal, comes fairly as a matter to be considered within the words that are there used. If it was a matter to be considered before, the right to consider it is certainly not taken away, but I think the legislature has even recognised that it is a matter which may be within reasonable limits considered. What weight ought to be given to it, within what limits it ought to operate, are entirely questions for the tribunal. Certainly the sub-section is not very happily framed; the language is a little peculiar. When it speaks of the difference in treatment necessary for the purpose of securing in the interests of the public the traffic in respect of which it is made, I cannot suppose that the legislature by using that language (though perhaps that would be the more grammatical and natural construction) had in view that the motive of the railway company, or that the necessity which was to be yielded to by the railway company, was to be the public good. Of course a railway company endeavours to secure the traffic for its own advantage. That is the motive which operates upon the railway company.

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Naturally enough they want to secure all the traffic they can in order to do the best trade they can; but I think that the legislature has here pointed out that in considering a question of this sort you are not only to consider the legitimate desire of the railway company to secure traffic; but that you are to consider whether it is in the interest of the public that they should secure that traffic rather than abandon it or not attempt to secure it. Of course many cases might be put where, although the object of the railway company is to secure the traffic for their own purposes upon their own line, yet, nevertheless, the very fact that they seek by the charges they make to secure it operates in the interests of the public.

One class of cases unquestionably intended to be covered by the section is that in which traffic from a distance of a character which competes with the traffic nearer the market is charged low rates, because unless such low rates were charged it would not come into the market at all. It is certain unless some such principle as that were adopted a large town would necessarily have its food supplies greatly raised in price. So that, although the object of the company is simply to get the traffic, the public have an interest in their getting the traffic and allowing the carriage at a rate which will render that traffic possible, and so bring the goods at a cheaper rate, and one which makes it possible for those at a greater distance from the market to compete with those situate nearer to it. That is one class of cases, no doubt, intended to be dealt with. I think that is made evident by the fact that they are to consider whether it is necessary for the purpose of securing the traffic, and whether the inequality cannot be removed without unduly reducing the rates charged to the complainant. But, of course, it might be said: Well, but the railway company may be obliged, in order to get the traffic, to bring those distant goods at a very cheap rate. But then let them reduce all their rates on the intervening distances. If a man is nearer the market, let his rate be brought down accordingly, and all the rates will then come down except those from the distant point. But then it was seen there being two ways of creating absolute equality, one by raising the lower rate, another by diminishing the higher rate,

there were cases where you would not secure the traffic at all if you raised the lower rate, and where, on the other hand, if, as the condition of securing the traffic, you were to insist on diminishing the higher rate, it would be so diminished as to be quite unfair to the company, and would be unduly reducing the rates charged to the complainant. Therefore, the legislature said all those matters ought to be taken into account by the Commissioners or the Court so far as they think it reasonable.

I cannot but think that a lower rate which is charged from a more distant point by reason of a competing route which exists thence, is one of the circumstances which may be taken into account under those provisions, and which would fall within the terms of the enactment quite as much as the case to which I have called attention. Suppose that to insist on absolutely equal rates would practically exclude one of the two railways from the traffic, it is obvious that those members of the public who are in the neighbourhood where they can have the benefit of this competition, would be prejudiced by any such proceedings. And further, inasmuch as competition undoubtedly tends to diminution of charge, and the charge of carriage is one which ultimately falls upon the consumer, it is obvious that the public have an interest in the proceedings under this Act of Parliament not being so used as to destroy a traffic which can never be secured but by some such reduction of charge, and the destruction of which would be prejudicial to the public by tending to increase prices. Therefore it seems to me that, whether you look at the Act of 1854 by itself, or whether you look at it in connection with the provisions of sub-s. 2 of s. 27 of the Act of 1888, to which I have been referring, it is impossible to say that there is anything in point of law which compels the tribunal to exclude from consideration this question of competing routes. I do not go further than that. It is not necessary to go further than that. I am not for a moment suggesting to what extent it is to weigh. I am not suggesting that there may not be such an excessive difference in charge made in cases of competition, as that it would be unreasonable and unfair when you are looking at the position of the one trader as compared with the other. That may be so, but all that is matter for the tribunal to take

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into account, and certainly I think that they are entitled to take it into account, and to give weight to it as far as is reasonable. If that be so, it is of course sufficient to dispose of the present case.

Now I turn to the authorities. In *Ransome* v. *Eastern Counties Ry. Co.* (1), the point was just glanced at and left open. Cresswell, J., who delivered the judgment of the Court, said (p. 452): "Without deciding that a railway company may not charge different rates where coals are carried in large and small quantities, and where they are carried long and short distances, and where the difference is for the purpose of competing with another line, we think that some order must be made to prohibit the continuance of the practice now existing on the railway in question." There, it was left open as one of the matters undetermined, but which required consideration. In *Garton* v. *Bristol and Exeter Ry. Co.* (2), Cockburn, C.J., says (p. 652): "Nor is it necessary to say whether, with a view to meet competition by another railway company or another mode of carriage, the company may not say to persons having large quantities of heavy goods to send, 'If you will engage to send a given quantity, or to send all the goods you have to send, by our line, we will give you such an advantage.' If that be done bonâ fide with a view to overcome opposition, and the public in general are offered the same advantages under like conditions, it is unnecessary to say whether that might not be allowable, though I wish to guard myself against deciding that upon the present occasion." Therefore, there again the matter was dealt with as one which was left open for further consideration.

It is said that in the case of *Harris* v. *Cockermouth and Workington Ry. Co.* (3), a decision was come to which is adverse to the view that this competition may be taken into account. I do not think so. In that case there was no actual competition, but certain advantageous terms were given to Lord Lonsdale's tenants because it was said that there had been a threat, or at all events an apprehension, that if those terms were not given,

(1) 1 C. B. (N.S.) 437; 1 Ry. & Can. Ca. 63.

(2) 6 C. B. (N.S.) 639; 1 Ry. & Can. Ca. 218, 225.

(3) 1 Ry. & Can. Ca. 97.

Lord Lonsdale might make a railway which would compete with the railway of the defendants. But it will be found, in the judgment of Willes, J., that his opinion was based exclusively upon this, that this was a mere speculation, that if Lord Lonsdale attempted to make this railway he might find difficulties in doing so; he might have to go to Parliament, and then the traders might get terms imposed upon him, and that you could not make any such speculation the basis of a judgment in determining whether there was an undue preference or not. And when the other judgments are looked at also, it will be seen that it was there a mere question of apprehended competition.

The only case in which there was an actual decision that a competing route might not be taken into account was, I think, *Budd* v. *London and North Western Ry. Co.* (1) That was an action brought to recover overcharges from the London and North Western Railway Company. The plaintiff's works were situated on the defendants' railway at a point nearer the market by some miles than certain other works which were within a six mile radius of Swansea. The railway company charged for the carriage of goods to works within the six mile radius of Swansea less actually than they did from the plaintiff's works, although the goods were carried over the same line, and therefore, coming from a point further from the point of destination than the plaintiff's, passed over the whole journey which was made by the plaintiff's goods. This was defended on the ground that in the neighbourhood of Swansea there was competition by the sea route, and that was the explanation of the lower charge. It may be doubted whether, even if competition could properly be taken into account, the action of the defendants there was capable of justification, because the charge made was actually smaller than the charge made to the plaintiff. Now, inasmuch as they carried not only from a point beyond that from which they carried the plaintiff's goods, but carried the goods of these other traders over exactly that piece of line over which they carried for the plaintiff, and yet made a smaller charge, it may have been difficult to say that the equality clause—that is to say, the 90th section of the Railways Clauses Consolidation Act of 1845—was

(1) 4 Ry. & Can. Ca. 393.

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not infringed. But, however that may be, there is no doubt that the Chief Baron did express a strong opinion that it was a breach of s. 2 of the Railway and Canal Traffic Act, 1854, because he said the question turned on the construction of that section. I am unable to agree in the view of the learned judge, if it involves the proposition that competition cannot be taken into account at all, although it may be that in that case the difference of treatment was such as, even taking competition into account and allowing for it, could not be justified. But this case of *Budd* v. *London and North Western Ry. Co.* (1) is as a decision unquestionably no longer law. It was an action brought to recover differences which were said to constitute an overcharge by reason of difference of treatment under s. 2 of the Act of 1854. The House of Lords has decided in the *Denaby Main Colliery Co.* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (2) that no such action will lie, that a broad distinction must be drawn between what is known as the equality clause in the Act of 1845, which only applies as regards carriage over the same portion of the line, and an appeal to the Court against an undue preference under the Act of 1854. Where there is a breach of the equality clause, no doubt you may sue to recover the difference on the basis that you can compel the railway company to pay you back anything which you have paid over what, for precisely the same service, they have charged to another. But under the Railway and Canal Traffic Act, as was pointed out in the House of Lords, the company have their option. They may put up one charge, they may put down the other. It is not an equality clause; it is only a clause relating to undue preference or advantage, and under those circumstances *Budd* v. *London and North Western Ry. Co.* (3) is no longer law. One could only have recourse to it now for the weight which is to be attributed to the dicta of the learned judges. When you turn to the judgment of Cleasby, B., he says (ib. p. 805) that he does not at all share the confidence with which the Chief Baron has come to the conclusion that the plaintiff could recover, and is glad to be able to base his judgment on the authority

(1) 4 Ry. & Can. Ca. 393. (2) 11 App. Cas. 97.
(3) 36 L. T. (N.S.) 802.

of *Evershed* v. *London and North Western Ry. Co.* (1), which seemed to him conclusive. Huddleston, B., goes further, and says he is by no means as satisfied as the Chief Baron, and if the case of Evershed had not been decided, he would have been prepared to go further still with Mr. Webster, who was then arguing for the company. Therefore those learned judges do not certainly indicate any view which can be appealed to on the present occasion.

The case of Evershed, which was supposed to be an authority, cannot now, in the light of the decision in the *Denaby Main Colliery Co.* (2), be regarded as an authority on that point. In *Evershed's Case* (3), no doubt, in the argument in the Court of Appeal, both the equality section and the undue preference section were alluded to, as they were in a judgment to which I will call attention in a moment; but the equality section clearly applied in that case, because all the goods were carried only over the same piece of line; and, therefore, on that ground the House of Lords affirmed the judgment in *Evershed's Case* (4); but, in the view of the House of Lords, in the subsequent case of the *Denaby Main Colliery Co.* (2), it was only on that ground that they affirmed it, and not with any reference to the 2nd section to the Act of 1854, inasmuch as in the subsequent case the House of Lords held that no such action as was brought in *Evershed's Case* (1) would have lain in respect of any charge of undue preference under the Act of 1854. Therefore, *Evershed's Case* (1) as an authority upon this point is gone. No doubt, when you are dealing with the Railways Clauses Consolidation Act, 1845, as Lord Blackburn points out in his judgment in *Evershed's Case* (5), the words of the equality clause have no elasticity at all; there are no outside circumstances to be taken into consideration, and it is not a question of regarding the position of the one trader as compared with the other, and then saying whether there is any undue preference. It is an absolute rigid equality which is demanded by the statute. Lord Blackburn said it might have been very reasonable even in that case to allow other considerations

(1) 2 Q. B. D. 254.
(2) 11 App. Cas. 97.
(3) 3 Q. B. D. 134.
(4) 3 App. Cas. 1029.
(5) 3 App. Cas. 1037, 1038.

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to weigh, but that the legislature had not done so. Then, in *Evershed's Case* (1), no doubt, Lord Bramwell in his judgment did say (2) that in his view it would be an undue preference within the Act of 1854, as well as a breach of the equality clause of 1845. I need hardly say that I always attach great weight to his opinion, and speak of it with the utmost respect; but at that time the contrast between the purpose, and the distinction between the scheme of the Act of 1845 and that of 1854, had not been as thoroughly considered as it was by the House of Lords in the subsequent case of the *Denaby Main Colliery Co.* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (3) It is quite clear that the second ground on which he gave judgment for the plaintiff in *Evershed's Case* (1) cannot possibly be supported after the case in the House of Lords; and I think that the learned judge had not thoroughly considered—indeed, in that case he was not called upon to consider—the distinction which there is between the two statutes, and how considerations wholly outside the scope of the one may legitimately enter into the determination of a case under the other.

Those, I think, are all the authorities to which I need call attention, and it will be seen that there is really no decision which runs counter to the opinion which I have expressed upon the true construction of the statute, viz.: that the appellants have not made out here that, in point of law, the Railway Commissioners have taken into consideration any elements which the law excludes from their consideration.

I think, therefore, on those grounds, the judgment must be affirmed with costs.

LINDLEY, L.J. I am of the same opinion, and will add very little. To my mind, the difficulty in this case is nothing like the importance of it. When the facts are understood, I do not see any difficulty in it. Sect. 17 of the Railway and Canal Traffic Act, 1888, says, "No appeal shall lie from the Commissioners upon a question of fact." Now, the appeal here is put, as it must be put, upon a question of law—viz., whether there is any

(1) 3 Q. B. D. 134. (2) 3 Q. B. D. 142.
(3) 11 App. Cas. 97.

rule which compels us to say that the Commissioners had no right to take into their consideration the fact that Butlins and Islip had two routes of communication westward instead of one. It appears to me that there is no such rule, and I cannot help thinking it would be extremely unreasonable if there were. Upon what principle of good sense can any business man or anybody else exclude from his consideration the locality of either place? If there is a physical difference in favour of one or the other, or an artificial difference by reason of the facilities of traffic, whether by sea or by land, why is not everything which is material to be taken into account, and upon what principle can it be said that you are to exclude from consideration one of the main elements in the case? The observations which I have made have no reference to the equality clause. The equality clause imposes a rigid rule; and putting it shortly, it is to the effect that for the same service the same sum is to be paid. One can understand that. Everything turns upon the words "the same." The moment the service is not the same the rule does not apply; and it appears to me that if the law were to the effect contended for it would be extremely irrational.

I think that upon the construction of the 1st clause of s. 27 of the Act of 1888, the appellants are obviously right. [The Lord Justice here read that clause.] That clause appears to me to be perfectly intelligible. The moment one of two traders on the same line finds that the other is being charged at a less rate than he is, he is entitled to say to the railway company, "How do you justify that?" As I understand this section, the burden of proof is on the railway company to shew that such lower charge or difference does not amount to an undue preference.

That gives rise to the question, What is an undue preference? Now, if you look at the sections which relate to this matter, beginning with the equality clause, s. 90 of the Act of 1845, s. 2 of the Act of 1854, and this s. 27 of the Act of 1888, you find these expressions used, all of which appear to me to point to the same sort of mischief. You have "undue," or "unreasonable," or "unfair" "preference," or "prejudice," or "disadvantage," or "favour." What is undue, &c., is a question of degree, and being a question of degree, it is obviously a

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question of fact, and if it is a question of fact, there is no appeal.

I shall pause there, because Lord Herschell has exhaustively gone through the statutes and the authorities. It appears to me that this appeal, when you come to understand it, is on a question of fact, and that the question of law upon which alone it can possibly be supported must be decided against the appellants.

KAY, L.J. Lord Herschell has dealt so fully and exhaustively with all the points that have been argued in this case that I shall add very little. It is quite plain that this Court cannot entertain this appeal unless it is on a question of law; and in whatever words you state the proposition, the only question of law, at any rate the main question of law, that has been argued before us is this, whether or not in arriving at the conclusion which the Commissioners did arrive at, that there had been no undue preference, they were entitled to take into consideration the competition which actually existed by the Midland line for carriage to the common market.

Now, it is not suggested that there is anything in the Acts of Parliament which expressly prevents them taking this into consideration. As Lord Herschell pointed out, in the Act of 1854 there is no guide whatever to the meaning of "undue preference," which are the words used in the second section of that statute. In the Act of 1888 there is some guide. In s. 55 of the Act there is something which is not really a definition, but which affords some assistance to the construction of this clause: "The term undue preference includes an undue preference, or an undue or unreasonable prejudice or disadvantage, in any respect, in favour of or against any person or particular class of persons, or any particular description of traffic." The words "in any respect" certainly seem to shew that a very wide construction is to be given to the words "undue preference." But then in s. 27 there is this, which to my mind rather points to the duty of the Commissioners or the Court to take into consideration such a circumstance as the existence of competing lines. In the 2nd sub-section it is

stated that in deciding whether a lower charge does or does not amount to an undue preference, the Court or the Commissioners may, so far as they think reasonable, in addition to any other considerations affecting the case, take into consideration whether such lower charge or difference in treatment is necessary for the purpose of securing the traffic. I have purposely left out some words. "Securing the traffic," of course, means securing it to the railway company making this difference in charge. There are added words which I omitted to read just now, viz.: for the purpose of securing "in the interests of the public." But still one of the things to be taken into consideration is whether it is necessary for the purpose of securing to the railway which makes the lower charge, the particular traffic. Securing traffic to the railway, of course, involves the notion that if the railway does not somehow or other give facilities for that traffic, it will go by some other route or in some other way, and the railway company will not have it to take; and therefore the word "securing" does point in some degree to the possibility of there being some competing route or competing way of taking this traffic to the common market. So far as there is an indication in the statute, it seems to me the indication is rather in favour of taking into consideration the competing route than against it. I gave the best attention to the case during the argument that I could, but I confess I cannot see any ground for holding that among the various considerations which may be regarded by the Commissioners or the Court, this fact of there being a competing route may not be one.

While the argument was going on, I put a case that was in my mind, in order to illustrate what seemed to me might be a great injustice, if we are prevented from taking this into consideration. Suppose that by a competing route, by another line of railway of equal importance, and which gave in every way the same facilities, the traffic had gone from either of the places in question to the common market at a particular rate for years; the London and North Western Railway Company, I will assume, had lost that traffic altogether, or had never been able to secure it, to use the word used in the statute; and I am assuming it

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could not be of the least importance to the persons who are now complaining by which route the traffic went; it would make no difference to them if the rates charged for taking it in either way were the same—can it be said that the Commissioners have no right in a case of that kind to say that the railway company are not giving an undue preference by taking this traffic to the common market for the same rates which the competing line would charge?

There is no possible disadvantage to the complainant in their doing so; it will get into the market at that rate of carriage by whichever route it goes. I think the interpretation clause which I have read rather points to this, that it is an element, in considering whether undue preference has been given or not, to see whether giving that preference puts the complaining party under any kind of disadvantage. It seems to me that it would be extremely unjust to say to the railway company, "You shall not do this in order to secure the traffic for yourselves," and that, whether it were in the interest of the public or not that they should secure the traffic. I cannot conceive it can possibly be said, with truth, that giving the same facilities to a trader to put his goods in the common market that another competing line gives, is not in some sense in the interest of the public.

I therefore come to the conclusion, and this is really the only matter we have to decide, that the Commissioners have not made any mistake in point of law in taking into consideration the fact that there was a competing line of the Midland by which the goods from Butlins and Islip got into the common markets at a particular fixed rate. They have done that, and the whole argument depends upon whether they could do it rightfully or not in point of law. I can see no reason why it was not perfectly right in point of law to admit that among the other considerations; and therefore I think, for that reason, this appeal is not competent.

I will observe with reference to the case of *Budd* v. *London and North Western Ry. Co.* (1), which has been criticised by Lord Herschell, that in the judgments both of Kelly, B., and

(1) 4 Ry. & Can. Ca. (B. & M.) 393; 36 L. T. (N.S.) 802; 25 W. R. 752.

Cleasby, B., *Evershed's Case* (1) is particularly relied on as the foundation of their decision. It is quite clear that *Evershed's Case* (1) was not decided upon this clause, but was decided upon the equality clause, the 90th clause of the Act of 1845.

Appeal dismissed.

Solicitors: *Capel Cure & Ball; C. H. Mason.*

W. W. K.

[IN THE COURT OF APPEAL.]

FOSTER *v.* REEVES.

County Court—Jurisdiction—Executory Agreement for a Lease—Specific Performance—Action for Rent.

The defendant entered on premises under an executory agreement for a lease. He subsequently gave six months' notice to quit, as if on a yearly tenancy, and left the premises. An action was brought in the county court for a quarter's rent, accruing due after the defendant had given up possession. The value of the premises exceeded 500*l.*, so that the judge had no jurisdiction to decree specific performance of the agreement; but he was of opinion that it was a case in which specific performance would be decreed, and that he was, therefore, bound to treat the defendant as tenant under the terms of the agreement, and he gave judgment for the plaintiff. On appeal:—

Held (affirming the judgment of the Queen's Bench Division), that the equitable doctrine that a person who enters under an executory agreement for a lease is to be treated as in under the terms of the agreement, can only be applied where the Court in which the action is brought has concurrent jurisdiction in law and equity, and that the plaintiff could not recover in the action.

APPEAL from an order of the Queen's Bench Division, on appeal from a judgment in a county court in favour of the plaintiff. The action was brought to recover 17*l.* 10*s.* for one quarter's rent of a house in Linton Road, Hastings. The plaintiff was the owner of the house, and in May, 1890, sent to the defendant an agreement in the ordinary form of a three years' agreement, from June 24 following, and afterwards from year to year until the agreement should be determined. The defendant did not sign this agreement, but he made and signed the following memorandum on the agreement: "May 12, 1890.

(1) 2 Q. B. D. 254.

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I hereby agree to enter into an agreement similar to the above upon the completion of the house to the satisfaction of myself or surveyor, and in consideration of possession being given me on June 1 next." The defendant took possession on June 12, and on December 22 following gave to the plaintiff a six months' notice of his intention to deliver up possession on June 24, 1891. The defendant abandoned possession in accordance with his notice. On October 15, 1891, a three years' agreement for a tenancy was tendered to the defendant, who refused to sign it, and this action was then brought for the quarter's rent accruing due after June 24, 1891.

The county court judge was of opinion that he had no power to decree specific performance of the agreement (a claim which had been made but abandoned), the value of the premises being over 500*l.*, but he was of opinion that it was a case in which specific performance would be ordered, and that, on the authority of *Walsh* v. *Lonsdale* (1), he ought to treat the defendant as tenant under the terms of the agreement, and he gave judgment accordingly for the plaintiff. The defendant appealed, and the Divisional Court set aside the judgment, and ordered that judgment should be entered for the defendant, but leave to appeal was given.

The plaintiff appealed.

W. F. Webster, in support of the appeal. If a court of equity would decree specific performance of this agreement, the defendant must be treated as if he held under it: *Walsh* v. *Lonsdale* (1); *Lowther* v. *Heaver* (2); *Coatsworth* v. *Johnson.* (3) The judge had, therefore, to inquire whether it was a case in which specific performance would be ordered. When he came to a conclusion that it was such a case, it was not necessary to wait for such a decree, but the defendant was to be treated as tenant for the term, and judgment given on that footing. The claim is a common law claim, although founded on an equitable doctrine.

S. Lynch, contrà. This was an equitable claim, and the county court had no jurisdiction to entertain it. *Walsh* v.

(1) 21 Ch. D. 9. (2) 41 Ch. D. 248.
(3) 55 L. J. (Q.B.) 220.

Lonsdale (1) does not apply, since the county court had no jurisdiction to deal with the question of specific performance.

W. F. Webster, in reply.

LORD ESHER, M.R. In this case the plaintiff brought an action against the defendant in the county court, to recover 17*l.* 10*s.* rent, due under an agreement. When the agreement is looked at, it is found that it assumes to create a tenancy for three years, to begin at a subsequent date. Such a tenancy can at common law only be created by deed, and the agreement cannot be used to enforce a claim for rent said to be payable by virtue of it, although the person who is required to pay is not in possession. If, therefore, we look to the common law alone, this claim cannot be supported. It is said, however, that equity would decree specific performance, and that if so the case is to be treated in every court as if specific performance had been decreed and a lease granted. If that argument is sound, the agreement is effective and the rent due. The answer given to this contention is that a county court has no jurisdiction in such an equitable matter, and cannot take notice of this equitable doctrine. The point is puzzling; but, on the whole, I think the county court judge had no right in this case to give judgment for the plaintiff. The matter could not be brought within the equitable jurisdiction conferred on county courts, and the judge had to deal with it at common law only. If the debt is an equitable one, and cannot be treated as a common law one, it could not be enforced in the county court.

It seems to me under these conditions that the judge of the county court was in the same position as a judge of a common law court in the old days, before the passing of the Judicature Acts. If an action such as this had then been brought in a common law court, and the agreement had been put in, it could not have been enforced, and the judge could have taken no notice of the equitable doctrine, or entertained any inquiry as to its effect. If the county court judge is only acting under the common law, must he not act in the same way? But it is suggested that there are cases to shew that, if equity would

(1) 21 Ch. D. 9.

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decree specific performance of the agreement, the case must be treated in all courts as if such a decree had been made, so that the equitable is converted into a common law debt. Some of the words used by Sir George Jessel in *Walsh* v. *Lonsdale* (1) are capable of that construction; but the ground of the decision is that, since the Judicature Acts, there is only one court, and that equity rules prevail in it. The Master of the Rolls was speaking of a court that could give relief by decreeing specific performance because the equity rules prevail. In the same way Cotton, L.J., in *Lowther* v. *Heaver* (2), uses language which is capable of the construction that a tenant holding under an agreement for a lease of which specific performance would be decreed, stands in all courts in the same position as if the lease had been granted; but he also was directing his remarks to a court in which specific performance could be decreed. There is another case which bears on this matter: *Swain* v. *Ayres*. (3) There the question was whether an agreement for a lease could be brought within the 14th section of the Conveyancing Act, 1881, which was held by the Court to apply only to an actual lease, and not to an agreement for a lease. The equitable doctrine as to the effect of an agreement for a lease was there also confined to cases in the High Court, and the decision does not go the length of saying that it should apply in any other court. These decisions do not apply to such a case as this in the county court, and that Court had no equitable jurisdiction in the matter. The position of the judge was, therefore, like that in which a common law judge would formerly have been. He could not entertain the equitable doctrine and apply it to the case before him, and treat it as if there had been a lease granted. Consequently the plaintiff could not recover, and the decision of the Divisional Court must be affirmed.

FRY, L.J. The question to be determined in this case is whether the county court had jurisdiction. The 17*l.* which was sued for was an equitable debt in this respect—that it was a sum which could be recovered in equity, provided the agreement

(1) 21 Ch. D. 9. (2) 41 Ch. D. 248.
(3) 21 Q. B. D. 289.

under which it was claimed was one that would be enforced by a court of equity. Independently of this, there was no right to sue for it. The county court judge had no jurisdiction to grant specific performance, and primâ facie it would appear that the case of a debt so closely dependent on whether specific performance would be granted was not one which the judge of the county court could entertain. It has been argued that the amount could be recovered as a legal debt by force of the Judicature Acts. It would be remarkable if this were so, because the debt would then be a common law debt contingent on an equity. In support of this view several cases have been cited which relate to the mode in which the High Court must now deal with equitable claims. In *Lowther* v. *Heaver* (1), Cotton, L.J., said that the rights of a tenant holding under an agreement for a lease of which specific performance would be decreed ought to be dealt with in the same way as if a lease had been granted to him. Dealt with by whom? By a court with competent jurisdiction at law and in equity, or by a court having only jurisdiction at law? I think the former, and that to apply such a rule to a court that has no equitable jurisdiction to deal with the case would be to extend unduly the language there used. Were we so to extend the rule, we should be going beyond the Acts conferring jurisdiction on county courts. The question whether specific performance would be granted in any case is an inquiry which might involve difficult questions of law and fact; and a county court judge, having determined these questions, would not be entitled to decree specific performance, but only to say that some other court would do so. I should not infer that this was a course likely to have been intended by the legislature. In my opinion the case was not one that could be entertained in the county court, and the judgment there entered for the plaintiff was rightly set aside.

LOPES, L.J. By the joint operation of the Statute of Frauds and 8 & 9 Vict. c. 106, a lease for more than three years must be by deed. Here the agreement purports to create a term of more than three years, and it is clear that rent could not, at common law, have been recovered under that agreement. To shew that

(1) 41 Ch. D. 248, at p. 264.

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it can now be recovered, *Walsh* v. *Lonsdale* (1) is cited. The principle of that case is thus stated by Jessel, M.R. (at p. 14): "A tenant holding under an agreement for a lease of which specific performance would be decreed, stands in the same position as to liability as if the lease had been executed. He is not since the Judicature Act a tenant from year to year; he holds under the agreement, and every branch of the Court must now give him the same rights." When the case is carefully looked at, it cannot be contended that the county court was contemplated. The Master of the Rolls said: "There is only one court, and equity rules prevail in it." The decision applies to every branch of the High Court which has concurrent jurisdiction in law and equity, but does not apply to a county court, which is not affected by the Judicature Acts. If this is so, the county court, having no equitable jurisdiction in this matter, is in the same position as that of the common law courts before the passing of the Judicature Acts. The common law courts could not then have entertained the claim, and the county court cannot now entertain it. I may add that I think it would be undesirable that the county court should have such jurisdiction, for the inquiry would generally be complicated, lengthy, and difficult to determine.

Appeal dismissed.

Solicitors for plaintiff: *John Hands, for Smith & Atkinson, Hastings.*

Solicitors for defendant: *W. H. Hales.*

(1) 21 Ch. D. 9.

A. M.

IN RE HULM & LEWIS. 1892 May 4.

Solicitor—Unqualified Person—Money and Documents in Possession of Unqualified Person acting as Solicitor—Attachment.

Where an unqualified person had obtained possession of money and documents by pretending to be a solicitor:—

Held, that the Court in the exercise of its summary jurisdiction could order him to deliver up such money and documents, and upon his disobedience could punish him by attachment.

Wilton v. *Chambers* (7 A. & E. 524) followed.

APPEAL from a decision of Pollock, B., refusing leave to issue a writ of attachment against one A. P. Lewis for contempt of Court in disobeying the order of a master requiring him to deliver to the applicant, Alfred Cohen, or his solicitors, all deeds, papers, and documents belonging to the applicant, and an account of all moneys received by him for or on account of the applicant, and to pay over such moneys to the applicant or his solicitors.

It appeared that in September, 1891, the applicant was introduced to A. P. Lewis as a solicitor, carrying on business in Gray's Inn, in partnership with Theophilus Hulm, under the style of Messrs. Hulm & Lewis, and that he employed the firm to act as his solicitors in respect of a composition with his creditors, and that the money and documents in question were received by A. P. Lewis as the applicant's solicitor for this purpose. Finding that his creditors were not being paid, the applicant, in March, 1892, instructed his present solicitors to take the matter out of the hands of Messrs. Hulm & Lewis, and on March 16 the summons was issued on which the order of the master was made. On March 19, A. P. Lewis handed some papers to the solicitors to the applicant, and promised to make out an account and pay over the sum due, and the hearing of the summons was adjourned. It was afterwards admitted on behalf of Messrs. Hulm & Lewis that 100*l.* was due from them to the applicant, and the solicitors to the applicant agreed to accept this sum in settlement of his claim, but it was not paid. On March 26 the master made the order, which was served upon

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Lewis, but not upon Hulm. Lewis afterwards stated on affidavit that he was not a solicitor, but was managing clerk to Hulm, who was a solicitor. Pollock, B., held that, as Lewis was not a solicitor, there was no jurisdiction to issue a writ of attachment against him.

George White, for the applicant. By Order XLII., rr. 7, 24, the order of the master can be enforced by attachment. [He referred to the Solicitors Act, 1843 (6 & 7 Vict. c. 73), ss. 2, 37; the Solicitors Act, 1860 (23 & 24 Vict. c. 127), s. 26: *Abercrombie* v. *Jordan* (1); *Lipscombe* v. *Holmes* (2); *Simes* v. *Gibbs*. (3)]

[COLLINS, J. Does it matter, as regards the jurisdiction of the Court to order the restoration of the money and documents, whether the person in whose possession they are is or is not a solicitor?

MATHEW, J., referred to *Wilton* v. *Chambers* (4), in which securities obtained on account of professional services rendered by a person who was at the time off the roll of attorneys owing to the operation of 37 Geo. 3, c. 90, were ordered to be given up and cancelled.]

No counsel appeared for the unqualified person.

MATHEW, J. The Court has, in my opinion, power to deal with the delinquent. He professed to be a solicitor, an officer of the Court, and in that capacity obtained possession of money and documents belonging to the applicant. On the supposition that he was a solicitor, an order was made against him at chambers for the delivery to the applicant of the money and documents so obtained. He did not obey that order, but negotiated in a manner calculated to deceive his supposed client. An application was, in consequence, made for leave to attach him for his disobedience, and then for the first time it was disclosed that he was not a solicitor. *Wilton* v. *Chambers* (4) shews that this is no answer to the order, and, therefore, no answer to the application for an attachment for disobedience to the order. A writ of attachment must be issued.

(1) 8 Q. B. D. 187.
(2) 2 Camp. 441.
(3) 6 Dowl. 310.
(4) 7 A. & E. 524.

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COLLINS, J. I am of the same opinion. I think that the Court has in these matters as much jurisdiction over a person who is not a solicitor as it has over a solicitor. Here a person who is not a solicitor has assumed the privileges of a solicitor, has obtained the custody of documents, has been intrusted with money, and has carried on legal proceedings as an officer of the Court. The Court finds this person in the possession of money and documents which, if he were a solicitor, he would be bound to hand over to his client. It seems to me that his not being a solicitor can make no difference. If this person were a solicitor the Court could compel him to restore the money and documents, and the Court must have the same power when he is shewn to have obtained possession of the money and documents by fraudulently pretending to be a solicitor. The case is completely covered by the authority cited by my learned brother.

Appeal allowed.

Solicitors for the applicant: *Leggatt, Rubinstein & Co.*

H. D. W.

[IN THE COURT OF APPEAL.]

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May 27, 28.

IN RE PEARSON. EX PARTE PEARSON.

Bankruptcy — Bankruptcy Notice — Service out of Jurisdiction — Foreigner resident out of Jurisdiction — Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 4, 1 (*g*); 6, 1 (*d*).

Held, following *Ex parte Blain* (12 Ch. D. 522) (decided upon the construction of the Bankruptcy Act, 1869), that the Court has no jurisdiction under the Bankruptcy Act, 1883, to allow the service of a bankruptcy notice upon a foreigner out of the jurisdiction.

APPEAL by J. F. Pearson against the refusal to set aside the service of a bankruptcy notice on the appellant in America.

Pearson was an American citizen, and the bankruptcy notice had, in pursuance of leave given by the Court, been served upon him in America by the International Bank of London. The notice had not been complied with. It was alleged that Pearson had within a year had a place of business in London; but this was disputed.

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Pearson applied to the Court to set aside the bankruptcy notice, the order giving leave to serve it, and the service. The registrar refused the application. Pearson appealed.

Levett, Q.C., and *Yate Lee*, for the appellant. There is no jurisdiction to allow the service of a bankruptcy notice upon a foreigner who is living abroad. The word "debtor" in sub-s. 1 (*g*) of s. 4 (1) of the Bankruptcy Act, 1883, means a debtor who is amenable to the English law of bankruptcy, either because he is a British subject or because he is temporarily within the jurisdiction of the Court. This was so decided with respect to a debtor's summons under the Bankruptcy Act, 1869: *Ex parte Blain* (2); *Ex parte Crispin.* (3) In order to found the jurisdiction of the English Court of Bankruptcy against a foreigner who is out of the jurisdiction, there must be an act of bankruptcy

(1) By s. 4: "(1.) A debtor commits an act of bankruptcy in each of the following cases (inter alia):—

"(*g.*) If a creditor has obtained a final judgment against him for any amount, and, execution thereon not having been stayed, has served on him in England, or, by leave of the Court, elsewhere, a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not, within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the Court that he has a counterclaim, set-off, or cross demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained."

By s. 5: "Subject to the conditions hereinafter specified, if a debtor commits an act of bankruptcy the Court may, on a bankruptcy petition being presented, either by a creditor or by the debtor, make an order, in this Act called a receiving order, for the protection of the estate."

By s. 6: "(1.) A creditor shall not be entitled to present a bankruptcy petition against a debtor unless (inter alia),

"(*d.*) The debtor is domiciled in England, or within a year before the date of the presentation of the petition has ordinarily resided or had a dwelling-house or place of business in England."

(2) 12 Ch. D. 522.

(3) Law Rep. 8 Ch. 374.

committed within the jurisdiction. The insertion in sub-s. 1 (*g*) of the words "or, by leave of the Court, elsewhere," has not altered the meaning of the word "debtor." It still means only a debtor who is properly subject to the law of England, and those words are satisfied by confining them to the case of an English debtor who has gone abroad. *In re Hecquard* (1) has no application. The sole question there was, whether the debtor came within s. 6—whether he had had a dwelling-house in England.

Bigham, Q.C., *Herbert Reed*, and *F. H. Mellor*, for the creditors. Assuming that the debtor had a place of business in England, s. 6 must be read in conjunction with s. 4 (1) (*g*). Sub-s. 1 (*d*) of s. 6 says that a bankruptcy petition may not be presented unless one of certain specified things occurs, one of those things being, "unless within a year before the date of the presentation of the petition the debtor had a place of business in England." This must mean that, if any one of those conditions exists, a bankruptcy petition may be presented, and an adjudication of bankruptcy made, against any debtor, provided that he has committed an act of bankruptcy. Sect. 6, sub-s. 1 (*d*), contemplates that any person who has a place of business in England may commit an act of bankruptcy, and one act of bankruptcy is non-compliance with a bankruptcy notice. The Bankruptcy Act, 1869, contained no such provision as sub-s. 1 (*d*) of s. 6: Williams on Bankruptcy, 5th ed. p. 33. *In re Norris* (2) shews that any man who comes within s. 6, sub-s. 1 (*d*), is amenable to the English Court of Bankruptcy. He is capable of committing an act of bankruptcy wherever he may be.

LORD ESHER, M.R. The appellant, who is an American, has been served in America with a bankruptcy notice; he has not paid the debt which was thereby demanded, and it is alleged that he has thus committed an act of bankruptcy, and that he is therefore liable to have a receiving order made against him in the English Bankruptcy Court. It is objected by the appellant that the English Court has no jurisdiction to give leave to serve a bankruptcy notice upon a foreigner out of the jurisdiction. The

(1) 24 Q. B. D. 71. (2) 5 Morrell, 111.

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Lord Esher, M.R.

question, therefore, is, whether the English Court had jurisdiction under the circumstances.

That the appellant carried on business in England for a time cannot be doubted; but it is admitted that, up to the time when leave was given to serve him with this bankruptcy notice, he had not committed any act of bankruptcy in England. Therefore, the question is whether a foreigner, who is not in this country, can be served with such a notice abroad, with the view of making him a bankrupt here if he does not comply with the notice. Unless s. 6 of the Bankruptcy Act, 1869, has been altered by the Bankruptcy Act of 1883, the point has been already decided by authority. *Ex parte Blain* (1) is a distinct authority that, under the terms of the Act of 1869, a debtor's summons could not be served on a foreigner abroad for the purpose of making him a bankrupt here; that he could not be made a bankrupt here unless he had committed an act of bankruptcy in this country. The reasons for so construing the Act of 1869 were given by James, L.J. I myself then rather elaborately gave my reasons for limiting the general words in the Act, in order to prevent the jurisdiction from being exercised in a manner contrary to the comity of nations. But it is said that there are in s. 4 of the Act of 1883 some words which were not in s. 6 of the Bankruptcy Act, 1869, and that, even if those words would not have the effect of altering the law if s. 4 stood alone, yet s. 6, taken in conjunction with s. 4, has the effect of altering the law. If s. 4 stood alone, applying to it the reasoning of the judgments in *Ex parte Blain* (1), it seems to me that the words are not so clear as to shew that the legislature intended to extend the jurisdiction of the Court, and to make the bankruptcy law of this country effective against a foreigner who is not here at the time. If I may say so, the reasoning of those judgments appears to me sound. Therefore, taking s. 4 alone, the same construction must be put upon it in regard to this point as was put upon s. 6 in the Act of 1869, and *Ex parte Blain* (1) governs the construction.

Now s. 4 states affirmatively what are to be acts of bankruptcy. Sect. 6 is a negative section, and it does not, in my opinion,

(1) 12 Ch. D. 522.

affect in any way the construction of s. 4. Unless a case can be brought within s. 4, it is not necessary to look at s. 6. If the case is brought within s. 4, and the debtor is a foreigner, it must also be brought within s. 6. But, if the case is not within s. 4, there is nothing in s. 6 which can bring it within the jurisdiction of the Court. Sect. 6 is only negative. Taking s. 4 to be, as I have said, of the same effect in substance as s. 6 of the Act of 1869, this debtor is not within s. 4 of the Act of 1883, because under s. 6 of the Act of 1869, as construed by this Court in *Ex parte Blain* (1), there was no jurisdiction to give leave to serve, or to serve, a foreigner in the position of the appellant with a debtor's summons abroad, so that, if he did not obey the summons, he might be made a bankrupt in England. That was the decision in *Ex parte Blain* (1). There is no act of bankruptcy upon which a receiving order could be made, and leave to serve the bankruptcy notice abroad ought not to have been given. The case not being within s. 4, it is immaterial whether the debtor comes within s. 6. The argument was pushed to this extent, that, if a foreigner were to come here for a short time, and so might be said to be residing in England (although he never traded and no monetary transactions took place between him and any other person in this country), the English Court of Bankruptcy, applying the bankruptcy law peculiar to this country, might ten or twenty years afterwards give leave to serve him with a bankruptcy notice abroad, in order that he might be adjudged a bankrupt in England. I think the very statement of such a proposition is enough to shew that it cannot possibly be maintained. In my opinion the decision of the registrar cannot be supported, and the appeal must be allowed.

FRY, L.J. I am of the same opinion. The question turns primarily on the construction of sub-s. 1 (*g*) of s. 4 of the Bankruptcy Act, 1883, which provides that certain specified acts committed by a "debtor" shall be "acts of bankruptcy." The argument for the appellant is that "a debtor" there does not mean a debtor all the world over, but that it means only a

(1) 12 Ch. D. 522.

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Fry, L.J.

debtor who is subject to the law of England, and that you must find such a debtor before an act of bankruptcy can be committed. In my opinion that argument is well founded, and I agree with the Master of the Rolls that the point was really decided in *Ex parte Blain* (1), because that decision was based, not on the particular words of the bankruptcy statute then in force, but upon general principles applicable to the construction of all statutes.

James, L.J., said (at p. 526): "It appears to me that the whole question is governed by the broad, general, universal principle that English legislation, unless the contrary is expressly enacted, or so plainly implied as to make it the duty of an English Court to give effect to an English statute, is applicable only to English subjects, or to foreigners who by coming into this country, whether for a long or a short time, have made themselves during that time subject to English jurisdiction." The present Master of the Rolls used precisely similar language. He said (at p. 528): "The governing principle is, that all legislation is primâ facie territorial—that is to say, that the legislation of any country binds its own subjects, and the subjects of other countries who for the time bring themselves within the allegiance of the legislating power." On that general principle I can entertain no doubt that s. 4 of the Act of 1883 relates only to debtors who are subject, either by birth and natural allegiance or by temporary residence, to the English law. Is there anything in the Act which raises a necessary implication of an intention on the part of the legislature to extend their legislation to the subjects of foreign countries—to persons who owe no allegiance to the law of England, either temporarily or permanently? Our attention has been properly called to those words in sub-s. 1 (*g*), which have, no doubt, been introduced into this statute for the first time, and which provide for the service of a bankruptcy notice upon a debtor "in England, or, by leave of the Court, elsewhere." But these words really create no difficulty, because a debtor who is permanently a subject of the English Crown, and who owes allegiance to all its Courts of law, may be out of England, and in such a case the service of a bankruptcy notice

(1) 12 Ch. D. 522.

upon him abroad could only be made by the leave of the Court.

It is contended that s. 6 makes a difference. That section provides that "a creditor shall not be entitled to present a bankruptcy petition against a debtor, unless," in certain events, one of which is, if he "is domiciled in England, or within a year before the date of the presentation of the petition has ordinarily resided or had a dwelling-house or place of business in England." We are asked to say that in any case to which the negative words of that clause do not apply the Court has jurisdiction. I think such a conclusion would be monstrous. The negative words of s. 6 do not imply, that, in every case to which they do not apply, the law of bankruptcy applies. They only import, that, in some cases to which they do not apply, the bankruptcy law may apply. We are driven, therefore, to inquire whether this is a case to which the law of bankruptcy does apply—whether there has been an act of bankruptcy—and upon that inquiry, in my judgment, s. 6 throws no light.

In my opinion, s. 4 must be interpreted according to the general principles of law to which I have referred, and s. 6 does not import any intention on the part of the legislature to extend its legislation beyond the ordinary subjects of the country.

I think, therefore, that this appeal must succeed.

LOPES, L.J. I am of the same opinion. I think that the word "debtor" in s. 4 means a debtor subject to the English bankruptcy laws; and, so soon as that construction is put upon the words, there is no difficulty in deciding this case. It is really governed by *Ex parte Blain* (1); and the judgment of Cotton, L.J., is well worth attention. He said (at p. 531): "I take it the limitation is this, that all laws of the English parliament must be territorial—territorial in this sense, that they apply to and bind all subjects of the Crown who come within the fair interpretation of them, and also all aliens who come to this country, and who, during the time they are here, do any act which, on a fair interpretation of the statute as regards them, comes within its provisions. Of course, it is not necessary that

(1) 12 Ch. D. 522.

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Lopes, L.J.

a person to be subject to an English Act should be domiciled here. If he is resident here temporarily, and does an act which comes within the intent and purview of a statute, he, as regards that statute, as does every alien who comes here in regard to all the laws of this realm, submits himself to the law, and must be dealt with accordingly. As regards an Englishman, a subject of the British Crown, it is not necessary that he should be here, if he has done that which the Act of Parliament says shall give jurisdiction, because he is bound by the Act by reason of his being a British subject, though, of course, in the case of a British subject not resident here, it may be a question on the construction of the Act of Parliament whether that which, if he had been resident here, would have brought him within the Act, has that effect when he is not resident here. As regards a British subject, whether he is here or not, he can be made bankrupt, if the Act of Parliament has declared that, in the events which have happened, he can be made bankrupt. But, as regards foreigners, there is, primâ facie, no right to bind them if they are not here." It is the commission of an act of bankruptcy which gives jurisdiction to the Bankruptcy Court. Sub-s. 1 (*g*) of s. 4 requires that, for the service of a bankruptcy notice elsewhere than in England, the leave of the Court must be given. There is no jurisdiction in the Bankruptcy Court to give that leave in the present case; and, consequently, there has been no act of bankruptcy. I think that this appeal ought to be allowed.

Appeal allowed.

Solicitors: *Norton, Rose & Co.; Harwood & Stephenson.*

W. L. C.

LONDON AND PROVINCIAL LAUNDRY COMPANY *v.* WILLESDEN LOCAL BOARD.

1892 *May* 10.

Local Government—Offences—Nuisance—Public Health Act, 1875 (38 & 39 *Vict.* c. 55), *ss.* 4, 42—"*House Refuse*"—*Clinkers from Furnaces in Steam Laundry.*

Clinkers produced in the furnaces of boilers belonging to a steam laundry, used to generate steam for the purpose principally of heating the water used in the business, but also for the purpose of warming the laundry, are not "house refuse" within the meaning of s. 42 of the Public Health Act, 1875, and therefore a local authority which has undertaken the removal of house refuse within its district is not bound to remove them.

Per Charles, J.: The definition of "house" in s. 4 of the Public Health Act, 1875, is not to be read into s. 42 of that Act, and therefore such a steam laundry, although containing a dwelling-house for the manageress and for the clerk in charge, is not a "house" for the purpose of the removal of "house refuse" under the latter section.

CASE stated by justices.

The respondents, the Willesden Local Board, were summoned to answer an information preferred on behalf of the appellants charging that they, being the local authority who had contracted for the removal of house refuse from premises in their district did unlawfully and without reasonable excuse, after notice in writing, fail to cause to be removed from the premises of the appellants certain refuse, contrary to s. 43 of the Public Health Act, 1875 (38 & 39 Vict. c. 55).

It appeared that the appellants, who were a limited company registered under the Companies Acts, were the owners and occupiers of certain premises within the respondents' district, erected for and used as a steam laundry, having attached thereto stables and a dwelling-house for the manageress and the clerk in charge; the portion used as a steam laundry consisted (inter alia) of washhouses, ironing-rooms, packing-room, drying-closet, engine-rooms containing furnaces and boilers, and other apartments and appliances for the purposes of their business, and for the use of the employés. There was a chimney-shaft ninety feet high in connection with the laundry. The appellants employed upwards of ninety persons in their business. In connection with the dwelling-house there was a separate dustbin or

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receptacle for house refuse, the contents of which had always been removed weekly by the respondents. The refuse referred to in the information consisted entirely of clinkers produced in the furnaces of the boilers situated in the engine-room, which were used to generate steam for the purpose principally of heating the water used by the appellants in their business, but also for the purpose of warming the laundry. The clinkers were produced to the extent of two or three loads per week, and had always been put in a part of the appellants' premises apart from any other refuse and had been removed by the appellants or at their own expense, and occasionally by the respondents, but not under compulsion. The respondents had received notice in writing from the appellants' manager requiring them to cause to be removed the refuse referred to in the information, but had refused to do so.

It was contended on behalf of the respondents—(*a*) that the refuse was not house refuse; (*b*) that the same did not belong to any house within their district; and (*c*) that the notice in writing was not from the occupier of a house within their district to which such refuse belonged within the meaning of the section.

The justices were of opinion that the refuse was not house refuse, but was refuse created by the necessities of the appellants' business; that the laundry premises were not a "house" within the meaning of the section, and therefore the refuse did not belong to a "house" within the respondents' district; and that the appellants were not in respect of the laundry premises the occupiers of a house within the meaning of the section, and therefore the notice in writing was not from the occupier of a house within the respondents' district to which such refuse belonged. The justices dismissed the information.

The questions for the opinion of the Court were whether, within the meaning of the section, (*a*) the refuse was "house refuse," (*b*) the same belonged to a house within the respondents' district, and (*c*) the notice in writing was from the occupier of a house to which such refuse belonged. (1)

(1) By s. 4 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), if not inconsistent with the context, "house" includes "schools, also factories, and other buildings in which more than twenty persons are employed at one time."

By s. 42 a local authority may un-

Germaine, for the appellants. These clinkers are not trade refuse, for they are not the refuse of a material in course of manufacture: *Vestry of St. Martin's* v. *Gordon* (1); and if they are not trade refuse they must be house refuse. The appellants' laundry is a "house" within the definition given in s. 4 of the Public Health Act, 1875, and therefore the clinkers are house refuse. The furnaces in which the clinkers are produced are not used solely for the purposes of the business; they are also used to warm the premises for the employés, and to that extent the clinkers are not the exclusive product of any manufacture, but are "domestic rubbish": *Lyndon* v. *Standbridge*. (2)

Sir R. Webster, A.G., and *Courthope Munro*, for the respondents, were not called upon.

DAY, J. I will not attempt to give an exhaustive definition of the expression "house refuse"; I content myself with saying that the refuse in this particular case was not house refuse.

CHARLES, J. I am of the same opinion. It is impossible to give to the word "house" in s. 42 the extensive meaning given to it in s. 4. The argument on behalf of the appellants rests upon this: the word "house" in the definition clause includes "factories and other buildings in which more than twenty persons are employed at one time"; that definition clause is to be read into the rest of the statute, and therefore "house" means in all sections that which the expression includes in s. 4. In my opinion that definition is inconsistent with s. 42, in which I think the expression "house refuse" is used to cover what Lord Bramwell, in *Lyndon* v. *Standbridge* (2), calls "house, occupation, inhabitancy, or domestic rubbish." I think that this refuse, the

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dertake or contract for "the removal of house refuse from premises."

By s. 43: "If a local authority who have themselves undertaken or contracted for the removal of house refuse from premises . . . . fail, without reasonable excuse, after notice in writing from the occupier of any house within their district requiring them to remove any house refuse, ... to cause the same to be removed . . . . within seven days, the local authority shall be liable to pay to the occupier of such house a penalty . . . ."

(1) [1891] 1 Q. B. 61.

(2) 2 H. & N. 45; 26 L. J. (Ex.) 386.

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removal of which it is sought to impose on the local board, is not domestic rubbish, and is not house refuse within the meaning of s. 42.

Appeal dismissed.

Solicitors for appellants: *Wilkinson, Howlett, & Wilkinson.*
Solicitors for respondents: *Tilley & Son.*

W. J. B.

C. A.

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June 25, 27.

[IN THE COURT OF APPEAL.]

KIRKHEATON DISTRICT LOCAL BOARD *v.* AINLEY, SONS & CO.

Local Government—Public Health—River, pollution of—Sewer, drainage flowing through into Stream—"Person who causes Sewage to flow into Stream"—Conjoint default of Owner of Premises and Local Authority—Discretion—Rivers Pollution Prevention Act, 1876 (39 & 40 *Vict. c.* 75), *ss.* 3, 10, 11—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 13, 15, 17, 19, 27—*—Practice—County Court Appeal, mode of bringing—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 120–124.

The defendants erected water-closets on their premises, the drains from which they connected with two small natural water-courses, which had become sewers, and were, therefore, vested in the plaintiffs, a local board. Through these sewers the sewage from the water-closets flowed by natural gravitation into a larger stream. The defendants were entitled as against the plaintiffs to connect the drains from their water-closets with these sewers under s. 21 of the Public Health Act, 1875; but the plaintiffs had not sanctioned their so doing. The plaintiffs under s. 10 of the Rivers Pollution Prevention Act, 1876, applied to a county court for and obtained an order to restrain the defendants from causing the sewage to flow into the stream. On appeal against this order, it appeared to the Court that, upon the facts of the case, the plaintiffs were themselves in default in not having made any provision for dealing with the sewage in these sewers, as required by the Public Health Act, 1875:—

Held, that the making of the order was discretionary, and although the defendants had offended against the Rivers Pollution Prevention Act, 1876, as a matter of discretion, under the circumstances of the case, an order ought not to be made against them at the instance of the plaintiffs, who were themselves offenders against that Act, and were seeking to avoid performance of their duty under the Public Health Act, 1875:

Held, also, that an appeal on the above-mentioned ground was correctly brought by way of motion.

By Bowen, L.J., and A. L. Smith, L.J.: An appeal from a county court on the merits under s. 11 of the Rivers Pollution Prevention Act is, by s. 124 of the County Courts Act, 1888, brought within the operation of s. 120 of that Act.

APPEAL from the judgment of the Queen's Bench Division, allowing an appeal from an order of the county court of Hud-

dersfield on an application under s. 10 of the Rivers Pollution Prevention Act, 1876, and directing judgment for the defendants.

The facts were, so far as material, as follows:—

The plaintiffs were a local board under the Public Health Act, 1875. The general character of the plaintiffs' district was rural. The defendants, who were manufacturers, had, in 1883, erected water-closets for the use of their workpeople in a manufactory belonging to them, situated in the plaintiffs' district. They connected the drains of these water-closets with two small natural water-courses which had been partly covered in by the plaintiffs, and which were not denied by them to have become sewers within the meaning of the Public Health Act, 1875, and to have, therefore, vested in them. These small water-courses, after converging, flowed into a stream called the Kirk Ings Beck, and the sewage found its way through them by natural gravitation into the beck. The defendants did not communicate their intention to make these water-closets drain into the sewers to the plaintiffs; but no complaint was made by the plaintiffs in respect of them until 1888. No means were taken to deodorize or otherwise treat the sewage so as to prevent pollution of the beck. It appeared that the medical officer and sanitary inspector of the local board knew of the erection of these water-closets; but there was no evidence that the board knew of or had ever given any affirmative sanction to their draining into the sewers. The county court judge found that the plaintiffs had not sanctioned the sending of the sewage into the stream through the sewers by the defendants. A nuisance being occasioned, in 1888 one Lodge, a riparian owner on the beck, complained to the Local Government Board, and made an application to them under s. 299 of the Public Health Act, 1875, to compel the plaintiffs to provide a proper system of sewerage for their district. The Local Government Board, however, refused the application, apparently on the ground that, the district being rural in its character, and these being the only water-closets in it, it was unreasonable to compel the plaintiffs to incur the great expense of establishing a system of sewerage for the district. It appeared from the correspondence that had taken place with regard to this application,

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KIRKHEATON DISTRICT LOCAL BOARD v. AINLEY, SONS & CO.

that the Local Government Board, in refusing the application, in effect pointed out that they had only jurisdiction to deal with the application before them under s. 299, and could not interfere with regard to the question what course the plaintiffs ought to take in dealing with the sewage in these sewers, which was a matter for them to determine.

Lodge thereupon applied to the Queen's Bench Division for a mandamus to compel the plaintiffs to make a proper system of sewerage within their district. That application stood over on the plaintiffs undertaking to disconnect the defendants' drains from the sewers, or to take proceedings against the defendants under the Rivers Pollution Prevention Act, 1876. The plaintiffs gave notice to the defendants of their intention to disconnect their drains from the sewers. The defendants thereupon applied for an injunction in the Chancery Division to prevent their doing so, which was granted by Stirling, J., on the ground that the defendants were entitled to cause their drains to empty into the sewers under s. 21 of the Public Health Act, 1875, the Local Board not having required any notice of intention to do so, or prescribed any regulations under that section. The plaintiffs thereupon applied to the county court under the Rivers Pollution Prevention Act, s. 10; and the county court judge made an order that the defendants should cease to cause or permit the sewage matter from the water-closets on their premises to flow into the beck.

The defendants appealed by motion to the Queen's Bench Division. The Divisional Court (Lawrance and Wright, JJ.) held that the appeal was rightly brought by way of motion; that the defendants were not liable as persons who caused the sewage to flow into the stream; that they were entitled to send the sewage into the sewers, and it was the duty of the plaintiffs to provide for the subsequent disposal of it. (1)

(1) The Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), s. 3: "Every person who causes to fall, or flow, or knowingly permits to fall or flow or be carried into any stream any solid or liquid sewage matter, shall (subject as in this Act mentioned) be deemed to have committed an offence against this Act. Where any sewage matter falls or flows, or is carried into any stream along a channel used, constructed, or in the process of construction at the date of the passing of this Act for the purpose of conveying such

Dodd, Q.C., for the plaintiffs. The defendants were guilty of an offence under the Rivers Pollution Prevention Act, 1876, s. 3. They caused sewage matter to flow into the stream. It is immaterial that they caused it to flow into the stream through the medium of the sewers and not immediately.

[LORD ESHER, M.R. These sewers had vested in the plaintiffs. A local board is bound to provide their district with the necessary sewers under the Public Health Act, 1875, and to provide properly for the disposal of the sewage. The Chancery Division seems to have held that the defendants were entitled to connect with these sewers. Under these circumstances is it not the plaintiffs themselves who cause the sewage to flow into the stream?]

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sewage matter, the person causing or knowingly permitting the sewage matter so to fall or flow or to be carried, shall not be deemed to have committed an offence against this Act, if he shews to the satisfaction of the Court having cognizance of the case that he is using the best practicable and available means to render harmless the sewage matter so falling or flowing, or carried into the stream. . . . . A person, other than a sanitary authority, shall not be guilty of an offence under this section in respect of the passing of sewage matter into a stream along a drain communicating with any sewer belonging to, or under the control of any sanitary authority, provided he has the sanction of the sanitary authority for so doing. By s. 10, the County Court having jurisdiction in the place where any offence against the Act is committed, "may," by summary order require any person to abstain from the commission of such offence. By s. 11, "If either party in any proceedings before the county court under this Act feels aggrieved by the decision of the Court in point of law or on the merits or in respect of the admission or rejection of any evidence he may appeal from that decision to the High Court of Justice," and "the appeal shall be in the form of a special case."

The County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 120, provides that, "if any party in any action or matter is dissatisfied with the determination or direction of the judge in point of law or equity, or upon the admission or rejection of any evidence, the party aggrieved by the judgment, direction, decision, or order of the judge may appeal from the same to the High Court in such manner, and subject to such conditions as may be for the time being provided by the rules of the Supreme Court regulating the procedure on appeals from inferior Courts to the High Court, &c." Sect. 124 provides that "no judgment or order of any judge, nor any action or matter brought before him or pending in his Court, shall be removed by appeal, motion, certiorari, or otherwise into any other Court whatever, save and except in the manner and according to the provisions in this Act mentioned. Order LIX., rr. 9, 10, provides that appeals from county courts shall be by notice of motion.

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Assuming that the plaintiffs were in default in not providing proper sewers, that does not entitle the defendants to contravene the provisions of the Rivers Pollution Prevention Act. The defendants' remedy is to apply for a mandamus to the plaintiffs to perform their duty.

[BOWEN, L.J. This order is in effect an injunction. Ought the Court to grant an injunction at the suit of those who really themselves cause the mischief by not performing their duty of providing for the sewage ?]

The Rivers Pollution Prevention Act, 1876, was not passed in the interest of local boards, but to prevent pollution of rivers to the detriment of the public. That the local board in their capacity under the Public Health Act have been guilty of default, if it be so, is no answer to proceedings taken by them in the interest of and as representing the public under the Rivers Pollution Prevention Act. It was held in *St. Helen's Chemical Co.* v. *Corporation of St. Helen's* (1), under the Nuisances Removal Act (18 & 19 Vict. c. 121), that the fact that a sanitary authority had themselves contributed to the existence of a nuisance did not disentitle them to take proceedings under the Act. In *Attorney-General* v. *Colney Hatch Lunatic Asylum* (2), where a local board was the relator, it was held that it was no answer to the information that the board had power itself to remedy the nuisance by making sewers. Under this Act the machinery of getting the Attorney-General to take proceedings is got rid of and the local board can proceed themselves, but in substance the same principle applies. The Local Government Board have found that it would be unreasonable, having regard to the circumstances of the district, that the plaintiffs should be ordered to construct a system of sewerage. The plaintiffs do not cause the evil themselves, because they are powerless to stop it: *Attorney-General* v. *Dorking.* (3)

[BOWEN, L.J. What was held there was that the Court would not grant an injunction against the board under the Rivers Pollution Prevention Act and that the remedy was by mandamus to make a proper sewerage scheme.

(1) 1 Ex. D. 196. (2) Law Rep. 4 Ch. 146.
(3) 20 Ch. D. 595.

LORD ESHER, M.R. There is no evidence to shew that, although it might not be reasonable to make a system of sewerage, there are no means by which the plaintiffs could so deal with this sewage as to obviate the mischief; they are bound to deal with the sewage under the Public Health Act, ss. 17, 19.]

It was never suggested by the defendants that there were any other means that could be taken.

It is contended that, if an offence was shewn against the Act, no discretion is given by s. 10 of the Act and an order must be made under it. "May" means "must" where a power is given in the interest of public justice: *Julius* v. *Bishop of Oxford.* (1)

Again, assuming that there is a discretion, having regard to the form in which this appeal is brought, the mode in which the discretion was exercised by the county court judge cannot now be questioned. The appeal on the merits given by s. 11 of the Rivers Pollution Prevention Act is by special case. This is not such an appeal. In this case the appeal was brought by motion in accordance with Order LIX., rules 9, 10, under the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 120, which only gives an appeal on matters of law. The way in which a discretion is exercised is not matter of law. Therefore, if there was evidence for the county court judge of a breach of the Rivers Pollution Prevention Act by the defendants, the appeal must fail. [He also cited *Reg.* v. *Staines Local Board.* (2)]

Bosanquet, Q.C., and *C. M. Atkinson*, for the defendants. The offence aimed at by the Rivers Pollution Prevention Act was in this case committed by the plaintiffs, and not by the defendants; secondly, if an offence against the Act was committed by the defendants, since the plaintiffs were equally guilty, they are not entitled to what is in effect an injunction to restrain the defendants under s. 10; thirdly, the question whether on the merits the plaintiffs were entitled to succeed is one with which this Court is entitled to deal under ss. 10 and 11 of the Act. This is not a case in which on proof that the defendants have transgressed an act, an absolute right is given to a judgment against them. It is a matter of discretion under s. 10, and under s. 11 the appeal is as wide as the discretion given to the county court under s. 10.

(1) 5 App. Cas. 214. (2) 60 L. T. 261.

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Assuming that an appeal on the merits under s. 11 is not within the 120th section of the County Courts Act, 1888, the effect of s. 124 of that Act is that all appeals from county courts must be in the manner provided by s. 120: *Eder* v. *Levy*. (1) With regard to the question who caused this sewage to flow into the stream so as to offend against the Act, the persons who must be considered to have caused it are the persons in whose control the sewers are.

[LORD ESHER, M.R. Do you contend that Mr. Lodge could not have obtained an order against the defendants?]

It is contended that he could not, because the defendants come within the third clause of s. 3 of the Rivers Pollution Prevention Act, and have drained into the stream through the sewers with the plaintiffs' consent. Stirling, J., held that they had a right to drain into the sewers. They had done so for many years, and the officials of the board knew that they were doing so. The board cannot say, after persons have drained into a sewer provided by them for years, that it was without their sanction. The local board are by s. 15 of the Public Health Act, 1875, bound to provide their district with the necessary sewers. By s. 21 of that Act the owner of premises is entitled to cause his drains to empty into the sewers of the authority, on giving such notice and complying with such regulations in respect of the mode of making the communication as the authority may prescribe, if any. And by s. 23 they may compel people to drain into such sewers. If a local authority provides a sewer and people drain into it for years that is sufficient sanction by the authority within s. 3 of the Rivers Pollution Prevention Act.

[LORD ESHER, M.R. The county court judge has found that the plaintiffs did not sanction the draining of these water-closets into the sewers.]

Assuming that the defendants were guilty of an offence within the section, and that the plaintiffs could not be reasonably called upon to make a system of sewerage for the district, there is nothing to shew that the plaintiffs could not have made cesspools to receive this sewage, or taken some other step to prevent its finding its way into the river. They are bound under the Public

(1) 19 Q. B. D. 210.

Health Act to deal with the sewage, and it is for them to prove that it is practically impossible for them to do so. Therefore they must be taken to have been themselves in default, and, as a matter of discretion, the Court ought not to grant an order in the nature of an injunction at the instance of parties equally in default with the parties proceeded against.

Dodd, Q.C., in reply.

LORD ESHER, M.R. The first question in this case is whether the defendants are offenders against the Rivers Pollution Prevention Act, 1876. That question depends on the terms of that Act only. The question is whether within the terms of that Act the defendants can be said to have caused sewage matter to fall or flow, or knowingly permitted it to fall or flow or be carried into the stream called the Kirk Ings Beck. What has happened is this. The sewage matter starts from their premises by their volition in such a way that it must go through a sewer, which, by the natural process of gravitation, will carry it into the stream. Reading the words of the Act according to their ordinary meaning, did or did not the defendants cause the sewage, which they thus sent from their premises, to flow into the stream? It seems to me that they did. Unless they had done what they did, it would not have flowed into the stream. They seem to me to be the causa causans, or, at any rate, the causa sine quâ non. Can the fact of their causing the sewage to flow through a sewer into the stream be said in ordinary language or by construction of the Act of Parliament to prevent them from being the cause of this sewage flowing into the stream? I do not think that it can. Therefore they are offenders under the Act. But in this case we have also to consider the conduct of the plaintiffs, and whether the effect of it is to prevent any liability on the part of the defendants. Suppose that, the defendants having offended against the Act, the plaintiffs have also been guilty of some dereliction of their duty, without which what the defendants did would not have caused the sewage matter to flow into the stream; is the effect of that dereliction of duty by the plaintiffs, in not preventing the consequence of the defendants' acts, that the defendants did not cause the sewage to flow into the stream; or

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does it not come to this, viz., that both the defendants and the plaintiffs are liable under the Act, the former for causing and the latter for knowingly permitting the sewage to flow into the stream? It appears to me that, on the assumption that the plaintiffs were guilty of a dereliction of duty as suggested, both the plaintiffs and defendants are brought within the terms of the Act and are liable for a breach of its provisions. The fact of a dereliction of duty on the part of the plaintiffs would not justify the defendants and take them out of the Act. The wrongful act of one person cannot excuse the wrongful act of another; both are liable. If, then, there were no other infirmity in the plaintiffs' case, I think that an order, in the nature of an injunction, ought to be made against the defendants under s. 10 of the Act. It was argued that such an order is not a matter of discretion either in the county court or in this Court; that, when once a case within the Act is made out, the Court is bound, as a matter of law, to make the order. Looking at the terms of s. 10 of the Act, it seems clear to me that this order, which is, in effect, an injunction, like every other injunction, is a matter of discretion. I think that it was a matter of discretion whether the county court judge should make an order under this section on these facts; and, if we think that on principle he ought not to have exercised that discretion as he did, then, in my opinion, that is matter of appeal under the County Courts Act, 1888, both to the Divisional Court and to this Court. It seems to me that, if the matter is one of discretion, the question how, upon facts which are determined and not in dispute, the discretion in such a case ought to be exercised, is a question of law as to which there is an appeal, although, no doubt, the Court will never interfere, unless they can see clearly that in point of principle the discretion has been wrongly exercised. The question, therefore, is whether we think that the county court judge wrongly exercised his discretion by making an order. When one finds that, as between the plaintiffs and the defendants, the defendants had a right to send this sewage into the sewers, and that it was the duty of the plaintiffs when it was once in the sewers to deal with it, so that it should not do a public mischief by flowing into a running stream; and when one comes to the opinion, as I do, that the plaintiffs have not

shewn any sufficient reason why they should not have done their duty in this respect; that they have not shewn anything which prevented or excused them from doing it, or that they could not by reasonable means and at a reasonable expense have done it; then I think that, they being joint offenders with the defendants, to allow them to obtain this order against the defendants and so cast off the duty imposed on them and throw it on the defendants, who have done no wrong as against them in causing the sewage to flow into these sewers, would be a wrong and unjust exercise of a judicial discretion. For these reasons I agree in the result of the decision of the Divisional Court, and think that this appeal should be dismissed.

BOWEN, L.J. I am of the same opinion. The first question is whether the defendants are offenders against the 3rd section of the Rivers Pollution Prevention Act, 1876. I am clearly of opinion that they are. That section provides that "every person who causes to fall or flow, or knowingly permits to fall or flow, or be carried into any stream any solid or liquid sewage matter, shall (subject as in this Act mentioned) be deemed to have committed an offence against this Act." The words "subject as in this Act mentioned" appear to refer to certain subsequent provisions in the section which limit its operations in certain cases. It appears to me that any person causes the flow of sewage into a stream within this enactment, who intentionally does that which is calculated according to the ordinary course of things and the laws of nature to produce such flow. A person who causes the flow of sewage into a channel, through which by the ordinary course of gravitation it will find its way into a stream, causes it to flow into the stream. Then we have to consider the position of the plaintiffs. They are an urban sanitary authority. By s. 13 of the Public Health Act, 1875, the sewers and all things belonging thereto vest in them, and are under their control. Therefore, these sewers were vested in them, and the sewage in them was under their control. By s. 15 they are to keep in repair all the sewers belonging to them, and to cause to be made such sewers as may be necessary for effectually draining the district. By s. 17 it is provided that nothing in

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the Act shall authorize them to use any sewer for the purpose of conveying sewage or filthy matter into any natural stream or watercourse, till it is freed from all excrementitious or other foul or noxious matter, such as would affect or deteriorate the purity and quality of the water in such stream or water-course. By s. 19 they are to cause the sewers belonging to them to be properly cleansed and emptied. By s. 27 they are given, for the purpose of disposing of sewage, power to construct works within their district or (subject to certain provisions) without their district. It might possibly be an answer to the complaint that they had neglected their duty to deal with the sewage in their sewers, if they could shew that they were actually without the means of disposing of it, and had not the power in any reasonable way to dispose of it; but I shall wait until a local board can satisfy me that it is in such an unfortunate position before I decide that question. In this case there does not appear to me to be anything to shew that the plaintiffs are in that position; on the contrary, on the materials before me, I cannot but think there are means by which they could deal with the sewage in these sewers so as to prevent its finding its way into the stream. If they have the power they are bound to do so. Therefore, I think that they themselves are within the section as persons who permit sewage to flow into the stream. It is no answer to say, if such were the fact, that the Local Government Board has pronounced an opinion in their favour that there were no means by which they could prevent the sewage from flowing into the stream. What the Local Government Board had said, on the application to them, could not in law prevent us from determining the question for ourselves, though of course we should not, in the face of the decision of the Local Government Board, lightly decide otherwise; but nothing is plainer to my mind, upon the correspondence that has taken place, than that the Local Government Board have not determined this question. They have, no doubt, refused to enforce the making of a general system of sewerage for the district, but they have, as I read the correspondence, distinctly declined to express any opinion as to what the plaintiffs ought to do with the sewage in these sewers. Therefore, the result is that both

parties are in default, and it is by the intervening default of the plaintiffs that the consequence of the defendants' default has been a breach of the provisions of the Rivers Pollution Prevention Act. Under these circumstances the plaintiffs are obviously placed in a difficulty as to what course they shall pursue. They do not want to make a general system of sewerage for the district, and they are pressed on the one side by the defendants, and on the other side by Mr. Lodge and other riparian proprietors. Instead of taking some steps to deodorize or otherwise dispose of the sewage, they have adopted the course of putting in force the Rivers Pollution Prevention Act against the defendants, forgetting that in the eyes of justice their default is as great as, and even greater than, that of the defendants. The Master of the Rolls has pointed out, and I see no answer to his view, that the county court judge had ample discretion in the matter, and could have granted or refused what in substance was an injunction, though it is called an order in the Act. It has been argued that the local board stands in the position of the public, and are applying for the protection of the public for an order to prevent a nuisance or injury to the public, or such portion of the public as are aggrieved; and, that being so, that it is no answer to the application to say that they have themselves done something wrong. On the assumption that they did stand in the position of the public in the sense contended for, there would not perhaps be much objection to the proposition advanced. There was a case cited by the counsel for the plaintiffs in which a compulsory duty was imposed upon the local board to take proceedings before justices for the abatement of a nuisance, and the justices had no discretion in the matter, but were bound to make an order. Under those circumstances the Court held that it was no answer to such proceedings to say that the board were in default. In that case the matter was compulsory, and the board were bound to represent the public and to take the steps they did. In such a case to refuse the remedy which was asked for by the board in the name of and as representing the public, or such portion of the public as was aggrieved, would have been to refuse all remedy. Again, cases have been referred to in which the Attorney-General represented

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the Crown in asking for an injunction against nuisances. I do not think that those cases have any bearing on the present. The Attorney-General represents the Crown and the public, and the conduct of the relator has not necessarily any bearing on the matter; unless in some way the position of the Attorney-General is tainted by the conduct of the relator, there is no reason why he should not succeed as representing the interests of the public, whatever the conduct of the relator may have been. It appears to me that the cases cited for the plaintiffs have no application to this case. We must come back to the section itself, which shews that the county court has a discretion to make an order either on the prosecution of the local board, or on that of any other person aggrieved. Therefore the public, or such portion of the public as are aggrieved, are not simply at the mercy of the local board. A person aggrieved can take proceedings on his own account. It, therefore, seems to me that in such a case as this, there is ample ground for thinking that the conduct of the local board may be taken into account in considering whether an order ought to be made at their instance. I do not say that, because a local board have done wrong, the court must necessarily, and in all cases, refuse to make the order at their instance; but it is, I think, matter for the consideration of the Court, whether the plaintiffs' conduct is such as to make it unjust that the order should be made at their instance, and if so, on the general principles of justice, the Court ought to say that, whoever else may be aggrieved and entitled to complain, it does not lie in the mouth of the local board to do so. I think that the good sense of that view appears from this consideration. The local board profess to come forward on behalf of the aggrieved portion of the public, and say that they have the duty of guardianship over the interests of their district. But it by no means follows that, where the board are in such default as in this case, it is in the interest of the public that the order should be made at their instance. It would have the effect of enabling them to escape from the pressure of their own district, and to compel those who have water-closets to convert them into cesspools, and so hark back to a bygone system which, at any rate for the present, has been discredited and abandoned. It may not be for the interest

of the public that the local board should escape in that way; and it might be most unjust to the defendants that the plaintiffs should be allowed to put the provisions of the Act in force against them, although it may be that other persons ought to be allowed to do so. The object of these proceedings on the part of the board appears to me to be to emancipate the board as between themselves and the defendants from the duty of properly disposing of the sewage in their sewers. The grounds upon which I arrive at the conclusion that the order of the county court judge should be rescinded, are not exactly the same as those upon which the Court below acted, but they are grounds which appear to me to be in accordance with the general principles of equity in relation to the matter.

With regard to the form in which the matter comes before us, assuming that this is an appeal on the merits, I think that the appeal is rightly brought by way of motion and not by way of special case. The matter stands thus. It is provided by s. 124 of the County Courts Act, 1888, that "no judgment or order of any judge, nor any action or matter brought before him, or pending in his Court, shall be removed by appeal, motion, certiorari, or otherwise, into any other court whatever, save and except in the manner and according to the provisions in this Act mentioned." An appeal from the county court on questions of law is provided for by s. 120 of the Act, but that section does not say anything as to the special kind of appeal where a statute, as in the present case, gives an appeal on the merits. Nevertheless, I think that s. 124 draws within the provisions of s. 120 special appeals like this, though they are not within the terms of that section; and, therefore, that in an appeal under the Rivers Pollution Prevention Act, the procedure is that given by s. 120, and the rules of Court made in pursuance of it. For these reasons I think that we may deal with this as an appeal on the merits, and may do what the county court judge, in my opinion, ought to have done in deciding against the plaintiffs.

A. L. SMITH, L.J. I also think that the order of the county court judge ought to be set aside, and this appeal dismissed. If the matter turned on the Public Health Act of 1875 alone, the

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defendants' counsel would have been right in his contention that the defendants were entitled to drain through these sewers into the stream. But that Act must be read in conjunction with the Rivers Pollution Prevention Act, 1876, and, reading the two Acts together, the true construction of them is that, though the defendants under the Public Health Act could make out that they were entitled to drain into these sewers and through them into the stream, yet after the Act of 1876 was passed, it was not lawful for either the plaintiffs or the defendants to cause sewage to flow into the stream through those sewers, unless it could be proved that in accordance with the second clause of s. 3, the best practicable and available means to render harmless the sewage matter so flowing into the stream had been used, or unless the defendants could shew that they had the sanction of the sanitary authority for what they were doing. I, therefore, come to the conclusion that both the plaintiffs and defendants have brought themselves within s. 3, and are both equally liable for offences against its provisions. Then comes the further point, is it just and right that, where there are two offenders, one should be able to come to the Court and get the yoke off his neck and put on the neck of the other? I agree that it is not; and upon this ground I am of opinion that the appeal should be dismissed. I agree that the appeal was rightly brought by way of motion, and with the reasons of Bowen, L.J., thereon.

Appeal dismissed.

Solicitors for plaintiffs: *Van Sandau, Armitage & Co., for Mills & Nalder, Huddersfield.*

Solicitors for defendants: *Brook, Freeman, & Batley, London and Huddersfield.*

E. L.

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Feb. 10;
June 1.

Revenue—Probate Duty — Bonâ fide Mistake in Valuation — Liability of Executor after close of Administration—"Person acting in the Administration of the Estate"—Customs and Inland Revenue Act, 1881 (44 & 45 *Vict. c.* 12), *s.* 32.

By s. 32 of the Customs and Inland Revenue Act, 1881, it is provided, that "if at any time it shall be discovered that the personal estate and effects" of a deceased person "were at the time of the grant of probate . . . . of greater value than the value mentioned in the certificate . . . . the person acting in the administration of such estate and effects shall within six months after the discovery deliver a further affidavit with an account to the Commissioners of Inland Revenue, duly stamped with the amount which, with the duty (if any) previously paid on an affidavit in respect of such estate and effects, shall be sufficient to cover the duty chargeable according to the true value thereof."

A testator bequeathed certain pictures and other property to be held by trustees as heirlooms. His executors, upon his death, caused a valuation to be made for probate purposes, and delivered to the Commissioners of Inland Revenue an affidavit of value with an account on the basis of such valuation, duly stamped in accordance with the provisions of the Customs and Inland Revenue Act, 1881. Upon this a certificate was issued stating the value as shewn by the account, and probate was granted. Some time after the executors had fully and finally wound up the estate, it was discovered that one picture had been omitted from the valuation, and that others had been considerably undervalued. No suggestion was made of any negligence on the part of the executors, or of any incompetency on the part of the valuer.

On an information praying that the executors should be ordered to deliver a further affidavit and account, in accordance with the provisions of s. 32:—

Held, that the executors, having completed the duties of administration, were not "persons acting in the administration of the estate" within the meaning of the section, and were not therefore liable.

INFORMATION by the Attorney General, praying (inter alia) that it might be declared that the personal estate and effects of one William Charles Smith, deceased, were at the time of the grant of probate of greater value than the value mentioned in the certificate made pursuant to s. 30 of the Customs and Inland Revenue Act, 1881, and that the defendants, as executors of the said William Charles Smith, were bound under the said Act to deliver a further affidavit with an account to the Commissioners of Inland Revenue, duly stamped for the amount which with the duty previously paid on the affidavits in respect of such estate and effects should be sufficient to cover the duty chargeable according to the true value thereof.

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Sir Edward Clarke, S.G., and *Vaughan Hawkins*, for the Crown.

Rigby, Q.C., and *L. T. Dibdin*, for the defendants.

The facts and arguments sufficiently appear from the judgments.

Cur. adv. vult.

June 1. The following judgment was read by

HAWKINS, J. This is an information filed by the Attorney General against the defendants, the surviving executors of W. C. Smith, late of Shortgrove, in the county of Essex, Esquire, deceased, to recover an amount of probate duty in addition to that paid at the time of the grant of probate, upon the ground that since that grant it has been discovered that the personal estate of the deceased was of greater value than that in respect of which duty was then paid. The proceedings are based upon the provisions contained in s. 32 of the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), and the question we are asked to solve is substantially whether executors who have fully administered the whole of the personal estate of their testator can after they have done so be treated as "persons acting in the administration of such estate" within the meaning of that section.

The material facts of the case are as follows: Mr. W. C. Smith made his will on April 18, 1879. By it he appointed the defendants and one George James Philip Smith his executors. He died on June 6, 1883. His will was proved by all his executors on August 15, 1883. By that will the testator among other things bequeathed unto his said executors and Charles Martin Wade as trustees five pictures by Sir Joshua Reynolds and Gainsborough, and one by Hoare, as and for heirlooms upon trusts set forth in the will.

In the inventory upon which the affidavit of value made for probate duty purposes was based, the picture by Hoare was accidentally omitted, and consequently no probate duty was ever paid upon it specifically. The five other pictures were valued at 1194*l.* 10*s.*

Before probate was granted, the Controller of Probate and Legacy Duties put to the executors the following questions:—

"Is the value put upon the furniture such as would be accepted on a sale? And are any paintings or articles of vertu included?

"If so, please give particulars. Should a sale take place during the course of administration and a larger sum be realized additional duty will be payable."

To these questions the following answers were given:—

"The paintings and the articles of vertu and most valuable portions of the furniture are made heirlooms, and will in the ordinary course not be saleable till the eldest son of a boy now four or five years of age attains twenty-one. If the executors had been directed to sell them, they would have sold them on the value put upon them in the valuation for probate, if more had not been offered. . . . . The valuation of the paintings for probate purposes was made by Mr. J. E. Gardner, of 9A and 10, Craig's Court, Charing Cross."

No suggestion was made questioning the truth and honesty of this answer, or of the competency and integrity of Mr. Gardner.

After receipt of this answer the controller raised no further question. The probate duty was paid on the basis of that valuation, and probate was granted. Shortly afterwards the executors assented to the bequest of the pictures as heirlooms, and delivered them to the trustees, by whom they were handed over to the tenant for life under the limitations of the will.

The testator's estate was fully administered and wound up, and the administration thereof was closed in March, 1886. Since that time the defendants have not, *as executors*, had any part of the testator's estate in their hands or under their control, nor have they in any manner acted as executors.

In 1888 application was made by the tenant for life to the High Court of Justice for leave to sell the said pictures. Such leave was granted, and under it the pictures were sold for 14,500*l.*, 500*l.* being the price realized for the painting by Hoare. What the real value of the pictures was when probate was granted has not been ascertained; but it must be taken that the amount mentioned in the valuation did not represent their full value.

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Under these circumstances, this information has been filed for the purpose of enforcing payment of additional duty under s. 32 of 44 & 45 Vict. c. 12.

The defendants resist the claim on the ground that they were not when the discovery of the greater value of the pictures was made "persons acting in the administration" of the estate and effects of the testator.

The payment of probate duty at the present day is regulated by Part III. of the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), commencing with s. 26. The effect of ss. 26 and 27 is to abolish the stamp duty theretofore payable upon probates of wills, and in substitution thereof to require that corresponding duties graduated according to the value of the estate shall be charged in the shape of stamp duties upon the affidavits required from persons applying for probate. By s. 30, no probate can be granted unless the same bear a certificate of the proper officer of the Probate Court, shewing that the requisite affidavit has been delivered, duly stamped, and stating the amount of the gross value of the estate to be administered. Sect. 32, under which the present claim is made, enacts, that "if at any time it shall be discovered that the personal estate and effects of the deceased were at the time of the grant of probate . . . of greater value than the value mentioned in the certificate, or that any deduction for debts or funeral expenses was made erroneously, *the person acting in the administration of such estate and effects* shall, within six months after the discovery, deliver a further affidavit with an account to the Commissioners of Inland Revenue, duly stamped for the amount which, with the duty (if any) previously paid on an affidavit in respect of such estate and effects, shall be sufficient to cover the duty chargeable according to the true value thereof." The obligation to deliver such further affidavit, it will be observed, is cast upon "*the person acting in the administration of such estate and effects*," and upon no other. The question is, how are these words to be interpreted?

The argument of the Solicitor General for the Crown was that they meant simply the executors to whom probate was granted. For the defendants, the executors, it was contended that though, no doubt, they would have been bound to deliver such further

affidavit, had such discovery been made during their administration of the estate, no such obligation now attaches to them, as the discovery was not made until after they had fully administered all the testator's effects under the probate granted to them. After much consideration, I have arrived at the conclusion that the defendants are right in their view.

The language of the section may be a little ambiguous; but it is obvious that the obligation contended for could only arise when the discovery was made, and I think it equally clear that in using the word "discovery" the legislature meant discovery or knowledge of such greater value by the persons to be charged with the obligation, and in defining those persons as the persons "acting in the administration of the estate," the legislature must be taken to point to the persons *then* so acting, i.e., at the time the discovery is made by them. Any other construction would, as it seems to me, be not merely contrary to the true interpretation of the language used in the enactment, but unreasonable and unjust. Of course, my observations are not intended to apply to cases where the error has arisen through gross negligence amounting to misconduct, nor where fraud or wilful deception has been practised upon the revenue, but only to cases like the present, where the utmost good faith has been observed, every reasonable endeavour has been made to ascertain the true value of the estate, every inquiry on the part of the Revenue Commissioners has been truly answered to the satisfaction of the commissioners, the probate has been granted in the full belief on all sides that the value was truly stated in the affidavit and certificate, and the executors, acting under the authority conferred by the probate, have to the last farthing's worth distributed the whole of that estate according to law, so that nothing further remains to be done by them. It is difficult to see how an executor can be said to be acting in the administration of an estate which he has already fully and finally administered, and in respect of which no duty remains for him to perform. Under such circumstances, all that could be truly said would be that until the estate was all distributed, but no longer, the executor was acting in the administration of it; but he had ceased so to act when further action became impossible.

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I cannot bring my mind to believe that the legislature intended that an honest executor, who has to the full discharged every obligation cast upon him by his office, should for an unlimited number of years remain personally liable to the Crown for extra stamp duties in respect of a probate under which alone he has legally acted simply because, after (it may be years after) his executorship accounts have been closed, and he has no longer any means of indemnifying himself out of the estate, it is accidentally, by the light of subsequent events, discovered that in making the original valuation a mere error in judgment was committed by the valuer in estimating at too low a sum the value of some portions of the estate. If such had been the intention of the legislature how easy it would have been to have used the words, "The executor to whom probate was granted," instead of "the person acting in the administration of the estate." Whilst "acting in the administration," the executors must be presumed to have sufficient of the estate in hand to recoup themselves such stamp duties as they may be required to pay for probate; for, strictly speaking, the power to administer the estate does not legally exist until the probate is granted, and although, seeing the difficulties and inconveniences which would necessarily arise if it were insisted upon that probate should be obtained the instant after the decease of the testator, the legislature has not imposed any penalty upon executors administering the estate without probate for six calendar months, substantial penalties are imposed if probate be delayed for a longer period (see 55 Geo. 3, c. 184, s. 37). The construction I place upon s. 32 is confirmed by the language of s. 31, which provides for the return by the Crown of overpaid duty by enacting that if at any time after the grant of probate, "*and during the administration of the estate,*" the value mentioned in the certificate of the officer of the Court shall be found to exceed the true value of the personal estate of the deceased it shall be lawful for the Commissioners of Inland Revenue to return the amount of stamp duty which shall have been overpaid. It would be idle to suggest that a discovery of the excess made *after* the whole estate had been administered and the administration closed would entitle executors to a return of the sum overpaid. Sect. 31 unequivocally points to the period

during which the estate is in course of administration. It follows, as it seems to me, that it is only during such period that a person can be "acting in the administration."

The 12th section of the Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), though not directly touching probate duty, nevertheless seems to me to indicate the general views of the legislature that, with the distribution of the estate after the executors have given to the Commissioners of Inland Revenue all information required or necessary to enable them to claim the proper duty, liability to any further duty ought to cease.

I would further add that the question and notice of the Controller of Probate and Legacy Duty, "Is the value put upon the furniture such as would be accepted on a sale, and are any paintings or articles of vertu included? If so, please give particulars. Should a sale take place during the course of administration and a larger amount be realized additional duty will be payable," is a strong indication that the controller entertains the same view that I have taken, viz., that the discovery which entitles the Crown to claim further probate duty, under s. 32, must be a discovery made *during the course of administration.*

I have not thought it necessary to comment upon other sections of the Act, nor to criticise the language of the ss. 41 and 40 in (the Probate Duty Act) 55 Geo. 3, c. 184, corresponding with ss. 32 and 31 of 44 & 45 Vict. c. 12, for they do not appear to me materially to assist in the solution of the question before us.

I purposely have made no distinction between the picture by Hoare, accidentally omitted from the valuation, and those which were included in the valuation and alleged to be undervalued, because probate was granted for, and justified the administration of, the whole estate of the testator, and not merely the items mentioned in the inventory valuation or account, and the duty payable was in respect of the whole estate, and not of separate parts; and if it had so happened that the valuer had estimated the pictures included in his valuation at a sum sufficient, in fact, to cover not only those pictures, but the omitted picture as well, the mere fact of its omission from the valuation would not have justified a claim for extra duty. *The Attorney General* v.

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Dardier (1) was cited to us in the course of the argument; but I fail to see its applicability to the present case. That case did not arise under any act relating to probate, but under a section relating to legacy duty not at all resembling the section I have been discussing. Moreover, in that case the error in the valuation was known to the executor in the course of the administration and during the performance of the executor's duties. Here the very reverse is the case. One further observation I would make as to the probate. Having been granted, it justified the executors in administering the whole estate, and the insufficiency of the stamp (if proved) would not affect its validity, though, whilst insufficiently stamped, its admissibility in evidence might be affected.

No disputed matters of fact have been discussed before us; the real value of the pictures, when probate was applied for and granted, must not, therefore, be taken as ascertained.

As to whether or not, having regard to the fact that the executors are also two of the trustees under the will, the Crown can, by any other proceedings, enforce the payment of the extra duties claimed, I offer no opinion (2). I simply confine myself to answering the question which arises upon this information, namely, whether upon the admitted facts the defendants are, as executors, liable in these proceedings. I think they are not. Our judgment ought, therefore, to be for the defendants, with costs.

The following judgment was read by

WILLS, J. William Charles Smith, by his will, dated April 18, 1879, appointed George James Philip Smith and the defendants his executors and trustees, and bequeathed to them (inter alia) his pictures upon trust that his said trustees should stand possessed of them as heirlooms upon certain trusts not necessary to set out.

The testator died on June 6, 1883. Probate of his will was granted on August 15, 1883, to the said G. J. P. Smith and the defendants.

(1) 11 Q. B. D. 16.

(2) See *Clegg* v. *Rowland*, Law Rep. 3 Eq. 368, Malins, V.C.; *In re Smith. Henderson-Roe* v. *Hitchins*, 42 Ch. D. 302, North, J.; *Jervis* v. *Wolferstan*, Law Rep. 18 Eq. 18.

George James Philip Smith died on April 1, 1886. In the valuation made of the estate for the purpose of probate, the pictures were valued at 1194*l.* 10*s.*, and that value was adopted in the affidavit of value made for probate duty purposes by the three executors.

The executors, shortly after probate granted, assented to the bequest, and held the pictures upon the trusts of the will.

In the year 1888 the tenant for life under these trusts applied for and obtained the leave of the Court to sell the pictures. They were sold in September, 1888. Four of them turned out to be genuine paintings by Gainsborough, one to be by Sir Joshua Reynolds, and one (a portrait of the Earl of Chatham) by Hoare. These six pictures sold for 14,500*l.* There were many other pictures included in the valuation, and by inadvertence the portrait of Lord Chatham, which sold for 500*l.*, had been omitted from the valuation. The valuer was a competent person. The valuation, it is admitted, was honestly made, and the fact that one of the pictures had been omitted was not discovered by the defendants till after the present proceedings had been begun. The estate of the testator was fully administered and wound up in March, 1886, since which time none of the executors have ever performed any act of administration. Upon the sale in 1888 legacy duty in respect of the pictures became, for the first time, payable by virtue of 36 Geo. 3, c. 52, s. 14. Upon the settlement of the legacy duty the Commissioners of Inland Revenue became aware that in the original affidavit of value a mistake—which, so far as the executors are concerned, it is admitted was neither dishonest nor negligent—had been made, and that the stamp duty paid upon obtaining probate was too low. The present information asks that the defendants may be compelled to rectify the mistake and pay the deficient amount of duty.

The claim is founded upon the Customs and Inland Revenue Act, 1881, 44 & 45 Vict. c. 12, s. 32, which is as follows:—

"If at any time it shall be discovered that the personal estate and effects of the deceased were at the time of the grant of probate or letters of administration of greater value than the value mentioned in the certificate, or that any deduction for debts or

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funeral expenses was made erroneously, the person acting in the administration of such estate and effects shall within six months after the discovery deliver a further affidavit with an account to the Commissioners of Inland Revenue duly stamped for the amount" deficient, with 5 per cent. interest from the time when it should have been paid.

The contention for the Crown is that the governing words are "if at any time" the discovery in question shall be made, and that any person who would be entitled without a fresh grant of probate or letters of administration to administer if there were anything to administer answers the description of "the person acting in the administration of the estate." The defendants contend that the words mean the person acting in the administration of the estate at the time the discovery is made, and that if by that time the executor or administrator has fully discharged the duties of administration, and ceased to act in the administration of the estate, he is no longer "acting in the administration," and is under no liability to make the fresh affidavit and pay the additional duty.

I am of opinion that the contention of the defendants is correct.

The words "acting in the administration of the estate" are not found in the Act 55 Geo. 3, c. 184, by which, until the Act of 1881, probate duty was regulated. By s. 41 of that Act it was provided, that where any person in applying for probate has estimated the value of the estate at less than it shall afterwards have proved to be, it shall be lawful for the Commissioners to cause the probate to be duly stamped on payment of the full duty and the penalty for stamping deeds after the execution thereof without deduction of the duty originally paid, with a proviso that if the application shall be made within six months of the discovery of the mistake, and there shall have been no intention to defraud, the Commissioners may remit the penalty, and cause the probate to be duly stamped on payment of the deficiency only.

By s. 43, "if any executor or administrator acting under such probate or letters of administration" shall not within six months of the discovery of a mistake in value apply to the Commis-

sioners and pay the deficiency he shall forfeit 100*l.* and 10 per cent. on the amount of duty deficient.

The words "acting under such probate or letters of administration" must have been put into the enactment for some purpose. If a perpetual liability had been intended to be imposed upon a person who had once been an executor or administrator nothing could have been simpler than to say "if any executor or administrator" on discovery of the mistake shall fail to apply and pay the deficient duty he shall be liable to the penalty. I am not able to understand why these words were introduced except for the purpose of qualifying the phrase "any executor or administrator" and restricting the liability to the executor or administrator who was still administering the estate.

The phrase "the person acting in the administration of the estate," in the Act of 1881, seems to me intended as the equivalent of "the executor or administrator acting under such probate or letters of administration" of the earlier Act. If so, it is not a simple synonym for "the executor or administrator," and the same meaning must be given to the words "acting in the administration of the estate" as to the corresponding words in the earlier Act. If "the executor or administrator" is all that is meant, there was no need of a paraphrase; whereas "the person acting in the administration of the estate" is a correct abbreviation of the phrase "any executor or administrator acting under such probate or letters of administration." This construction would protect the revenue in by far the greatest number of bonâ fide mistakes. It is only in the case of underestimation of articles of property specifically bequeathed that it would fail to do so. The statute, however, contains very ample provisions enabling the Commissioners to have their own valuation and assessment of duty if they are not satisfied with the qualifications or character of the valuer employed by the executor or with the amount returned, and it seems very unreasonable to cast the liability of personally making good a deficiency of duty upon an executor who has taken every means that an honest and careful man could take to be right, after any length of time, and when it may be quite hopeless for him to recoup himself. If the present contention of the Crown is right, the liability might fall

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upon an executor forty or fifty years after he has apparently fully discharged his duties as executor, should he so long live; and yet, if he should die, it clearly does not fall upon his estate, unless the executor of an executor should be held to be "the person acting in the administration of the estate" of the original testator. It certainly could not fall upon his estate if he made no will, for his administrator would have no right to act in such administration; and if the original estate were the subject of an intestacy, and therefore administered by an administrator, neither *his* administrator nor his executor could answer the description of "the person acting in the administration" of the original estate. The whole scheme of the legislation as to probate duty seems to me to avoid casting personal liability on the executor except in case of misconduct. He may, it is true, in some cases have to pay the duty out of his own pocket in the first instance, but only till realization of the estate; and if the estate is not immediately realizable and he has not money of his own, the Commissioners are empowered to give him credit.

Provisions are made for enabling him to get back duty paid in excess of the real liability, and the section by which this relief is secured appears to me to support the view I am presenting. By s. 31 of the Act of 1881, if at any time after the grant of probate and "during the administration of the estate," the amount of duty paid shall be found to exceed the true value of the estate, the Commissioners may return the overplus. If the pictures in the present case had been valued originally as genuine works of old masters, and the duty paid upon that footing, and if upon the sale it had turned out that they were only copies, no duty could have been returned; so with regard to errors in the amounts originally deducted for debts and funeral expenses; the period within which the mistake can be corrected is three years, or such further period as the Commissioners may allow. Why are these limitations imposed? Because it is better that there should be some finality in such matters, and the limitation adopted is either the actual close of the administration or a period within which that part of the administration which has to do with the ascertainment of debts is pretty certain to have been effectually dealt with. Why should not a corre-

sponding principle apply in respect of mistakes the other way? It seems to me far more reasonable that it should be so, than that an honest executor should be exposed to liability indefinite in point of time and amount, in cases so little likely to be of frequent occurrence as to be of any serious fiscal consequence; and although the protection of the revenue is important, it is perhaps hardly less important not to attach to the onerous office of an executor a liability of a very harsh, indefinite, and unreasonable character.

I can see no reason for making a distinction between the cases in which the valuer undervalued the pictures and that in which he omitted a picture altogether. Both mistakes are admitted to have been honestly made, and we have not been asked to try the question whether there was any carelessness on the part of the defendants which led to this omission by the valuer; and in my opinion the defendants are entitled to judgment with costs.

Judgment for defendants.

Solicitor for Crown: *The Solicitor of Inland Revenue.*
Solicitor for defendants: *Wade & Lyall.*

A. P. P. K.

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June 24.

Lunatic—Asylum—Expenses of Pauper Lunatics—Parochial Rates on Asylum Buildings—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *s.* 283.

The expression, "the expenses of maintenance and other expenses of each pauper lunatic in the asylum," in s. 283 of the Lunacy Act, 1890, includes the payment of parochial and other rates charged upon the buildings of the asylum, and payment of such rates may lawfully be made out of the maintenance fund of the asylum.

CERTIORARI to quash an order of disallowance and surcharge made by an auditor of the accounts of a pauper lunatic asylum.

By s. 279 of the Lunacy Act, 1890, it is enacted that "the accounts of every asylum belonging wholly or in part to a county council, and of the visiting committee and officers thereof, shall be subject to the provisions of the Local Government Act, 1888, relating to the accounts of county councils."

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By s. 71, sub-s. 3, of the Local Government Act, 1888 (51 & 52 Vict. c. 41), it is enacted that "the accounts of a county council, and of the county treasurer and officers of such council, shall be audited by the district auditors appointed by the Local Government Board in like manner as the accounts of an urban authority and their officers under ss. 247 and 250 of the Public Health Act, 1875."

By s. 3 of the District Auditors Act, 1879 (42 & 43 Vict. c. 6), it is enacted, that "where the accounts of the receipts and expenditure of a local authority are audited by a district auditor, the local authority shall prepare and submit to the district auditor at every audit . . . . a financial statement in duplicate in the prescribed form."

By an order of the Local Government Board, dated September 28, 1891, reciting the above sections, and reciting that a visiting committee of a pauper lunatic asylum belonging wholly or in part to a county council, was a local authority within the terms of the last-cited section, it was ordered that the financial statement of their receipts and expenditure during the year ending March 31, 1891, to be prepared and submitted to the district auditor in duplicate by the visiting committee of a pauper lunatic asylum belonging wholly to a county council of any administrative county in England and Wales, as a local authority, should, in respect of the year aforesaid, be in the Form A in the schedule thereto. The Form A classified the receipts and expenditure of visiting committees under three accounts—1. Maintenance Account; 2. Building and Repairs Account; 3. Farming and Gardening Account—and provided that the payment of "rates and taxes not included in the farming and gardening account" should be included in the expenditure on the building and repairs account.

The maintenance fund consists of contributions to the expenses of the lunatics in the asylum made by the several unions in the county to whom such lunatics are respectively chargeable, and is raised by rates levied on such unions. The building and repairs fund is raised by rates levied on the county at large.

The asylum of Whittingham is a pauper lunatic asylum

belonging wholly to the county council of the administrative county of Lancashire. The visiting committee of the said asylum are rated to the parochial and other rates as the occupiers thereof. During the year ending March 31, 1891, there became due from the visiting committee of the Whittingham Asylum, in respect of poor rates, highway rates, and church rates, charged upon the buildings of the asylum, sums amounting altogether to 137*l.* 13*s.* 5*d.* Messrs. R. Smith and M. S. Maynard, as members of the visiting committee of the said asylum, authorized the payment of 134*l.* 2*s.* 2*d.* in respect of such rates out of the maintenance fund; and Mr. T. Dilworth, as clerk of the said asylum, paid out of the maintenance fund the sum of 3*l.* 11*s.* 3*d.*, being the remainder of the 137*l.* 13*s.* 5*d.* due from the visiting committee on account of such rates. In the accounts of the asylum submitted to the district auditor by the visiting committee for the said year, the 137*l.* 13*s.* 5*d.* for rates on the asylum buildings, was charged against the maintenance account. The defendant, Dolby, as such district auditor, disallowed such payments out of the maintenance account, on the ground that, by the terms of the order of the Local Government Board, they should have been charged against the building and repairs account, and he accordingly surcharged the said R. Smith and M. S. Maynard with the sum of 134*l.* 2*s.* 2*d.*, and the said T. Dilworth with the sum of 3*l.* 11*s.* 3*d.* The parties so surcharged obtained a rule for a certiorari to bring up such order of disallowance and surcharge to be quashed.

Lumley Smith, Q.C., and *Macmorran*, for the district auditor, shewed cause. It was intended by the Lunacy Act, 1890, that the expense of the rates charged on the asylum buildings should fall, not on the unions sending lunatics to the asylum, but on the whole county at large. If the asylum is furnished with a medical and nursing staff, the rates have to be paid even though there are no lunatics in it. In such case the rates must be paid out of the building and repairs fund, for there would be no maintenance fund out of which to pay them. The expense of the rates, therefore, cannot be treated as part of "the expenses of maintenance and other expenses of each pauper lunatic in the

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asylum" within the meaning of s. 283 (1); and it is the expenses referred to in that section alone that can be charged to the maintenance account. That section, by expressly including the "salaries of the officers and attendants of the asylum," impliedly excludes the cost of rates. Moreover, the order of the Local Government Board of September 28, 1891, expressly provides that such rates shall not be charged to the maintenance account, and unless such order is ultrà vires, the auditor's order of disallowance cannot be questioned.

Smyly, Q.C., and *Mattinson*, for the parties surcharged. The scheme of the Act, so far as relates to liability for expenses of the asylum, was that such charges as are usually payable out of income should fall on the maintenance fund, and that those which are usually payable out of capital should fall on the building and repairs fund. Wherever it was intended to deviate from this general principle, there is express provision for the purpose. Thus, in s. 266, it is provided that the cost of repairs shall be paid out of the county fund, because primâ facie repairs, being properly a charge on income, ought to be paid out of the maintenance fund. So, too, it required the express provision in s. 280 to relieve the maintenance fund from the cost of pensions awarded to superannuated officers. But rates are clearly primâ facie chargeable against income, and there is no express provision in the Act to take them out of the general rule. The meaning of the expression "expenses of maintenance" in s. 283 is shewn by s. 287, which speaks of the "reasonable charges of the lodging, maintenance, medicine, clothing, and care (in this Act referred to as the expenses of maintenance) of such lunatic." It therefore includes lodging; but there is nothing to which the word "lodging" can refer except the payment of rates, for the building

(1) By 53 & 54 Vict. c. 5, s. 283, sub-s. 1: "Every visiting committee shall fix a weekly sum, not exceeding fourteen shillings, for the expenses of maintenance and other expenses of each pauper lunatic in the asylum, and of such amount that the total of such weekly sums shall be sufficient to defray such expenses, and also the salaries of the officers and attendants of the asylum, and such weekly sum may from time to time be altered."

Sub-s. 2: "If fourteen shillings a week is found insufficient for the purposes aforesaid, the local authority to whom the asylum belongs may by order direct such addition to be made to the weekly sum as to the local authority seems necessary."

itself is already provided by the county council under s. 238 out of the county fund. The order of the Local Government Board as to the accounts being rendered in the form prescribed is ultrà vires.

But even if the payment of these rates was wrongly charged against the maintenance account, the district auditor was wrong in personally surcharging the three persons who made the payments. The only power so to surcharge them is that given by s. 247 of the Public Health Act, 1875 (which by s. 71, sub-s. 3, of the Local Government Act, 1888, is made to apply to the auditing of the accounts of a county council); but that section only allows a surcharge where the payment was "contrary to law." But there was nothing contrary to law in the making of these payments; there was at the most merely a subsequent mistake as to the mode of making up the accounts.

WRIGHT, J. As regards the form in which the accounts of the visiting committee of a pauper lunatic asylum are to be prepared and submitted to the district auditor, I think there can be no doubt that the visiting committee are bound to obey the form prescribed by the Local Government Board, until that form has been quashed on certiorari, and that if they do not render their accounts in that form, they are, by s. 5 of the District Auditors Act, 1879, subject to the penalty provided by s. 98 of the Poor Law Amendment Act, 1834. That order of the Local Government Board, however, applies only to the form of the accounts, and does not touch the question as to the right of the visiting committee to pay poor-rates out of moneys in their hands. The question here is one of surcharge.

I think I must assume that the visiting committee have power to spend for the purposes of their current expenditure (other than the repairs and improvements mentioned in s. 266) any money in their hands which is not specifically appropriated by law to other purposes.

If so, then on this branch of the case two questions arise. First, Are these rates properly to be regarded as part of the committee's current expenditure? and secondly, Was the money out of which they were paid specifically appropriated to other purposes?

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On the first point it is important to note that the persons who are rated as the occupiers of the asylum are not the county council, but the visiting committee. Primâ facie, therefore, the visiting committee, being liable for the rates, would have power to pay them out of any unappropriated money in their hands. And further, I think that the language of s. 283 points to the conclusion that payment of rates in respect of the asylum buildings is part of the current expenses properly defrayable by the visiting committee, for the section provides that the visiting committee shall fix a weekly sum "for the expenses of maintenance and other expenses of each pauper lunatic in the asylum," and, as a matter of common sense, I think any one would say that the payment of rates for the asylum in which the lunatic is lodged is part of the "expenses of the lunatic in the asylum." Secondly, there is, in my opinion, no specific appropriation of the sums received from the unions for the expenses of the pauper lunatics. Sect. 283 merely specifies the amounts which are to be collected from the unions for that purpose; but it does not earmark the money when collected and say that the expenses shall be defrayed out of that money and out of no other. On this ground, therefore, even if there were no other ground, I should be of opinion that the rule should be made absolute.

But I also think that the surcharge on these individual gentlemen cannot be defended. It has been sought to justify it under s. 247 of the Public Health Act, 1875; but that section only authorizes a surcharge where the payment is illegal; and I can see no illegality in this payment. If the visiting committee have power to expend money on the payment of rates at all, the mere fact that they pay them out of the wrong fund cannot make the payment illegal.

COLLINS, J. I am of the same opinion. Two questions have been raised in this case—first, whether the payment of rates is properly a part of the expenses of maintenance of a pauper lunatic; and secondly, whether the surcharge of the individuals who have made that payment is one which can be sanctioned by this Court.

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With regard to the first question, whether the rates are part of the expenses of the maintenance of a lunatic, I am of opinion that that question ought to be answered in the affirmative. No one, I think, would deny that primâ facie the rates, which are payable quarterly, ought to be treated as part of the current expenditure, and not as part of the capital expenditure. And I think Mr. Smyly was perfectly right in saying that the broad scheme of the Act was that the capital expenditure should be borne by the local authority (in this case the county council), and the current expenditure by the particular unions which send the paupers to the asylum.

But let us look at the precise language of the sections dealing with this subject, and see what indication they give of the meaning of the words "expenses of maintenance." Sect. 283 provides that "every visiting committee shall fix a weekly sum, not exceeding fourteen shillings, for the expenses of maintenance and other expenses of each pauper lunatic in the asylum." That is a provision as to the amount which is to be charged for such expenses. Then comes a group of sections commencing with s. 286, and headed, "Liability for Expenses of Maintenance," containing a series of provisions as to where the money to defray the expenses is to come from, and how it is to be got. And in s. 287 we find power given to justices to make an "order upon the guardians of the union to which the lunatic is chargeable, for payment to the treasurer or manager of the institution, of the reasonable charges of the lodging, maintenance, medicine, clothing, and care (in this Act referred to as the expenses of maintenance) of such lunatic." That is an authoritative definition of the expression "expenses of maintenance" as used in the Act, and according to that definition maintenance includes the expense of lodging. Therefore, in fixing the weekly sum for the expenses of the lunatic's maintenance, under s. 283, the expense of his lodging must be taken into consideration. What, then, does "lodging" embrace? It seems to me that as the idea of lodging necessarily involves the user or occupation of the hereditament, the legislature contemplated that occupation and its incidents as part of the expenses of

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maintenance. But one of the incidents of occupation is that the premises will be rated. Therefore, it seems to me that the language of the Act points to the payment of the rates as one of the expenses of the maintenance of the lunatic. I am of opinion, therefore, that if there was money in the hands of the visiting committee not specifically appropriated to other purposes, a payment by them of rates out of that money was a legitimate payment.

Now I come to the second question, whether, assuming that the expenses of maintenance do not include the payment of rates, the payment made by these gentlemen can be properly surcharged against them. It seems clear that, except upon the hypothesis that that payment was an illegal payment, the surcharge cannot be permitted. Then, was the payment illegal? I am inclined to think that if it could have been shewn that it was made out of a fund specifically appropriated to other purposes it would have been illegal, and, therefore, I was anxious to see whether by the terms of the Act the money received from the unions constituted a fund which was specifically appropriated to purposes not including the payment of rates. But I can find nothing in the Act to shew that it is so. By s. 283, the committee are to fix a sum not exceeding fourteen shillings, which will presumably reimburse them for the expense of maintaining the lunatic. Then it is provided that if the fourteen shillings is found to be insufficient—which must obviously be after the lunatic has been maintained and the money expended—the county council may fix a greater sum. So that the Act contemplates the expenditure of money on the lunatic's maintenance, and contemplates a mode of recouping that expenditure, but it does not appropriate the money which the committee are entitled to demand from the unions to the one specific purpose of the lunatic's maintenance to the exclusion of all other purposes. Therefore, I am of opinion that, even assuming that the payment of rates is not included in the expenses of maintenance, the payment of the rates out of the money out of which they were in fact paid was not an illegal payment, and that these gentlemen consequently cannot be properly surcharged. I agree with my

brother Wright that on both grounds the rule for a certiorari must be made absolute.

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Rule absolute.

Solicitors for the parties surcharged: *Ridsdale & Son, for F. C. Hulton, Preston.*

Solicitor for the district auditor: *M. A. Orgill, for Llewellyn & Ackrill, Tunstall.*

J. F. C.

RIDGEWAY, APPELLANT *v.* FARNDALE, RESPONDENT.

1892

July 11.

Criminal Law—Vagrant Acts—Gaming—Betting in a Public Place—Article used as an Instrument of Gaming—"At any Game or pretended Game of Chance"—36 & 37 Vict. c. 38, s. 3.

In order to convict, under 36 & 37 Vict. c. 38, s. 3, of the offence of playing or betting by way of wagering or gaming, in a public place, with a coin, card, token, or other article used as an instrument or means of wagering or gaming, it is necessary to allege and prove that the defendant was guilty of wagering or gaming at some game or pretended game of chance.

CASE stated by the stipendiary magistrate for Birmingham.

An information against the appellant, charging him that he did unlawfully bet, by way of wagering, in a certain street, with certain articles used as a means of such wagering, to wit, written papers and coins (1), contrary to the Act 36 & 37 Vict. c. 38, s. 3 (2), was heard and determined.

It was contended on the part of the appellant that the information did not disclose any offence, inasmuch as the words "at

(1) A question was raised as to whether what the appellant had done was betting with any coin as an instrument or means of wagering within the Act; but it became unnecessary to argue or decide it, and so much of the case as related to that point is therefore omitted.

(2) 36 & 37 Vict. c. 38, s. 3, is as follows: "Every person playing or betting by way of wagering or gaming in any street, road, highway, or other open and public place, or in any open place to which the public have or are permitted to have access, at or with any table or instrument of gaming, or any coin, card, token, or other article used as an instrument or means of such wagering or gaming, at any game or pretended game of chance, shall be deemed a rogue and vagabond, within the true intent and meaning of the recited Act (5 Geo. 4, c. 83), and as such may be convicted and punished under the provisions of that Act," or may be fined.

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any game or pretended game of chance," which governed the whole of the section, were omitted, and that to constitute any offence it was necessary not only to allege but to prove the allegation that it was a game or pretended game of chance.

It was contended on the part of the respondent that the words "betting by way of wagering" in the section were not governed by the phrase "at any game or pretended game of chance," those words only applying to their immediate antecedent, "gaming"; that they could not refer to "betting by way of wagering," or to "wagering," as it was incorrect to speak of wagering "at" a game, the proper expression being "on" a game.

The magistrate was of opinion that the contention on the part of the respondent was correct, and convicted the appellant.

The conviction, which was set out in the case, stated that the appellant was convicted of being a rogue and vagabond, within the intent and meaning of 5 Geo. 4, c. 83, that is to say, for that he on, &c., at, &c., did unlawfully bet by way of wagering, in a certain street, with certain articles used as a means of such wagering, to wit, written papers and coins, contrary to the form of the statute.

If the Court should be of opinion that the contention of the appellant was correct, the conviction was to be quashed—if not, to remain in force.

Poland, Q.C. (*A. T. Lawrence*, with him), for the appellant, was stopped by the Court.

Channell, Q.C. (*Hugo Young*, with him), for the respondent. The conviction was right. One offence under 36 & 37 Vict. c. 38, s. 3, is playing or betting in a public place "at or with any table or instrument of gaming, at any game or pretended game of chance," which is also an offence under the Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 4. The later Act creates a further offence by the use of the additional words "or any coin, card, token, or other article used as an instrument or means of such wagering or gaming." In charging an offence comprised in these words, it is unnecessary to allege or prove that the playing or betting was at a game or pretended game of chance, for the expression "at any game or pretended game of chance" governs

only the words which occur in the earlier Act, and not the additional words introduced into the later Act.

WRIGHT, J. The original offence, as described by the Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 4, was "playing or betting in any street, road, highway, or other open and public place, at or with any table or instrument of gaming, at any game or pretended game of chance." The Act of 1873 (36 & 37 Vict. c. 38), s. 3, contains a similar provision, with the addition of the words "or any coin, card, token, or other article used as an instrument or means of such wagering or gaming"; but in that Act the words "at any game or pretended game of chance" remain a part of the essential definition of the offence. In the present case those words are omitted from the information, and the magistrate has come to no finding on an essential part of the case, namely, that the appellant was wagering or gaming at a game or pretended game of chance. The conviction is invalid on the face of it, and must be quashed.

COLLINS, J., concurred.

Conviction quashed.

Solicitor for appellant: *Dennison, for Tanner, Birmingham.*

Solicitor for respondent: *E. W. Smith, Town Clerk of Birmingham.*

P. B. H.

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May 28.

THE QUEEN *v.* RUSSETT.

Criminal Law—Larceny—Money paid or deposited under Contract induced by Fraud—Property remaining in Depositor—Possession obtained by Fraud—Larceny by a Trick.

Where the owner of money or goods parts with the possession of them under a contract induced by fraud, but does not intend to part with the property in them until the other party to the contract has fulfilled his part of the bargain, the person so fraudulently obtaining possession of the money or goods may be convicted of larceny.

The prisoner agreed at a fair to sell a horse to the prosecutor for 23*l.*, of which 8*l.* was to be paid to the prisoner at once, and the remainder upon delivery of the horse. The prosecutor handed 8*l.* to the prisoner, who signed a receipt for the money; by the receipt it was stated that the balance was to be paid upon delivery. The prisoner never delivered the horse to the prosecutor, but caused it to be removed from the fair under circumstances from which the jury inferred that he had never intended to deliver it:—

Held, that the prisoner was rightly convicted of larceny by a trick.

Case stated by the deputy-chairman of the Gloucestershire Quarter Sessions.

The prisoner was tried and convicted upon an indictment, charging him with having feloniously stolen on March 26, 1892, the sum of 8*l.* in money of the moneys of James Brotherton. It appeared from the facts proved in evidence that on the day in question the prosecutor attended Winchcomb fair, where he met the prisoner, who offered to sell him a horse for 24*l.*; he subsequently agreed to purchase the horse for 23*l.*, 8*l.* of which was to be paid down, and the remaining 15*l.* was to be handed over to the prisoner either as soon as the prosecutor was able to obtain the loan of it from some friend in the fair (which he expected to be able to do) or at the prosecutor's house at Little Hampton, where the prisoner was told to take the horse if the balance of 15*l.* could not be obtained in the fair. The prosecutor, his son, the prisoner, and one or two of his companions, then went into a public-house where an agreement in the following words was written out by one of the prisoner's companions, and signed by prisoner and prosecutor: "26th March, G. Russett sell to Mr. James and Brother (sic) brown horse for the sum of 23*l.* 0*s.* 0*d.*

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Mr. James and Brother pay the sum of 8*l.*, leaving balance due 15*l.* 0*s.* 0*d.* to be paid on delivery." The signatures were written over an ordinary penny stamp. The prosecutor thereupon paid the prisoner 8*l.* The prosecutor said in the course of his evidence: "I never expected to see the 8*l.* back, but to have the horse." The prisoner never gave the prosecutor an opportunity of attempting to borrow the 15*l.*, nor did he ever take or send the horse to the prosecutor's house; but he caused it to be removed from the fair under circumstances from which the jury inferred that he had never intended to deliver it.

It was objected on behalf of the prisoner that there was no evidence to go to the jury, on the ground that the prosecutor parted absolutely with the 8*l.*, not only with the possession but with the property in it; and, consequently, that the taking by the prisoner was not larceny, but obtaining money by false pretences, if it was a crime at all; the objection was overruled. In summing up the deputy-chairman directed the jury that if they were satisfied from the facts that the prisoner had never intended to deliver the horse, but had gone through the form of a bargain as a device by which to obtain the prosecutor's money, and that the prosecutor never would have parted with his 8*l.* had he known what was in the prisoner's mind, they should find the prisoner guilty of larceny.

The question for the Court was whether the deputy-chairman was right in leaving the case to the jury.

Gwynne James, for the prisoner. The conviction was wrong. The only offence disclosed was that of obtaining money by false pretences. There was no evidence to go to the jury upon a charge of larceny. The property in the money passed to the prisoner at the time when it was handed to him by the prosecutor, who admittedly never expected to see it again; the receipt given for the money is strong evidence of the change of property. The case is distinguishable from *Reg.* v. *Buckmaster* (1); for in that case the question was whether the prosecutor expected to have his money back. There is in the present case a breach of contract, for which the prosecutor has a civil remedy, and it is

(1) 20 Q. B. D. 182.

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immaterial that the prisoner in making the contract had a fraudulent intent: *Rex* v. *Harvey*. (1) For the fact that the contract was induced by fraud did not render the contract void, or prevent the property from passing: *Clough* v. *London and North Western Ry. Co.* (2) The principle of law is stated in Roscoe's Criminal Evidence, 11th ed. at p. 620, where it is said: "The doctrine is clearly established that, if the owner intends to part with the property in the goods, and in pursuance of such intention delivers the goods to the prisoner, who takes them away, and the property becomes his, this is not larceny, even though the prisoner has from the first a fraudulent intention."

Stroud, for the prosecution, was not called upon.

LORD COLERIDGE, C.J. I am of opinion that this conviction must be supported. The principle which underlies the distinction between larceny and false pretences has been laid down over and over again, and it is useless for us to cite cases where the facts are not precisely similar when the principle is always the same. When the question is approached it will be found that all the cases, with the possible exception of *Rex* v. *Harvey* (1), as to which there may be some slight doubt, are not only consistent with, but are illustrations of, the principle, which is shortly this: if the possession of the money or goods said to have been stolen has been parted with, but the owner did not intend to part with the property in them, so that part of the transaction is incomplete, and the parting with the possession has been obtained by fraud—that is larceny. This seems to me not only good law, but good sense, and this principle underlies all the cases. If, however, authority be wanted, it is to be found in two cases which we could not overrule without the very strongest reason for so doing: the first is *Reg.* v. *McKale* (3), where Kelly, L.C.B., said, "The distinction between fraud and larceny is well established. In order to reduce the taking under such circumstances as in the present case from larceny to fraud the transaction must be complete. If the transaction is not complete, if the owner has not parted with the property in the

(1) 1 Leach, 467. (2) Law Rep. 7 Ex. at p. 34.
(3) Law Rep. 1 C. C. 125.

thing, and the accused has taken it with a fraudulent intent, that amounts to larceny." The distinction, in which I entirely concur, is there expressed in felicitous language by a very high authority. The other case is that of *Reg.* v. *Buckmaster* (1), which seems to me directly in point; that decision was grounded on *Rex* v. *Oliver* (2) and *Rex* v. *Robson* (3), where the same principle was applied, and the same conclusion arrived at.

POLLOCK, B. I agree in the conclusion at which the Court has arrived, and would add nothing to the judgment of my lord but that I wish it to be understood that this case is decided on a ground which does not interfere with the rule of law which has been so long acted on; that where the prosecutor has intentionally parted with the property in his money or goods as well as with their possession there can be no larceny. My mind has therefore been directed to the facts of the case, in order to see whether the prosecutor parted with his money in the sense that he intended to part with the property in it. In my opinion, he certainly did not. This was not a case of a payment made on an honest contract for the sale of goods, which eventually may, from some cause, not be delivered, or a contract for sale of a chattel such as in *Rex* v. *Harvey* (4); from the first the prisoner had the studied intention of defrauding the prosecutor; he put forward the horse and the contract, and the prosecutor, believing in his bona fides, paid him 8*l.*, intending to complete the purchase and settle up that night. The prisoner never intended to part with the horse, and there was no contract between the parties. The money paid by the prosecutor was no more than a payment on account.

HAWKINS, J. I am entirely of the same opinion. In my judgment the money was merely handed to the prisoner by way of deposit, to remain in his hands until completion of the transaction by delivery of the horse. He never intended, or could have intended, that the prisoner should take the money and hold it, whether he delivered the horse or not. The idea is absurd;

(1) 20 Q. B. D. 182.
(2) 2 Russell on Crimes, 170.
(3) Russ. & Ry. 413.
(4) 1 Leach, 467.

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his intention was that it should be held temporarily by the prisoner until the contract was completed, while the prisoner knew well that the contract never would be completed by delivery: the latter therefore intended to keep and steal the money. Altogether, apart from the cases and from the principle which has been so frequently enunciated, I should not have a shadow of doubt that the conviction was right.

A. L. SMITH, J. The question is whether the prisoner has been guilty of the offence of larceny by a trick or that of obtaining money by false pretences; it has been contended on his behalf that he could only have been convicted on an indictment charging the latter offence; but I cannot agree with that contention. The difference between the two offences is this: if possession only of money or goods is given, and the property is not intended to pass, that may be larceny by a trick; the reason being that there is a taking of the chattel by the thief against the will of the owner; but if possession is given and it is intended by the owner that the property shall also pass, that is not larceny by a trick, but may be false pretences, because in that case there is no taking, but a handing over of the chattel by the owner. This case, therefore, comes to be one of fact, and we have to see whether there is evidence that, at the time the 8*l.* was handed over, the prosecutor intended to pass to the prisoner the property in that sum, as well as to give possession. I need only refer to the contract, which provides for payment of the balance on delivery of the horse, to shew how impossible it is to read into it an agreement to pay the 8*l.* to the prisoner whether he gave delivery of the horse or not; it was clearly only a deposit by way of part payment of the price of the horse, and there was ample evidence that the prosecutor never intended to part with the property in the money when he gave it into the prisoner's possession.

WILLS, J. I am of the same opinion. As far as the prisoner is concerned it is out of the question that he intended to enter into a binding contract; the transaction was a mere sham on his part. The case is not one to which the doctrine of false

pretences will apply, and I agree with the other members of the Court that the conviction must be affirmed.

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Conviction affirmed.

Solicitors for prosecution: *Indermaur & Brown, for Smith, Winchcomb.*

Solicitor for prisoner: *H. Lewis, Cheltenham.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A. 1892 *June* 20.

WOOLLEY *v.* BROAD.

Practice—Copyright in Design—Defendant's Particulars of Objection—Amendment—Discretion of Judge—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57).

The discretion of a judge to allow the amendment of particulars in an action for infringement of a patent or design cannot be affected by any practice as to the terms on which such amendment will be allowed.

Morris Wilson & Co. v. *Coventry Machinists Co.* ([1891] 3 Ch. 418) commented on.

APPEAL from a judgment of the Divisional Court.

In an action brought against the defendant for an alleged infringement of copyright in a registered design, the defendant, pursuant to order, delivered particulars of his objections to the originality of the plaintiff's design. The defendant subsequently applied for and obtained at chambers unconditional leave to amend his particulars. The Divisional Court affirmed this order.

The plaintiff appealed.

Dugdale, Q.C., and *E. M. Daniel*, in support of the appeal. A well-settled practice has grown up in patent actions, that if the defendant desires to amend his particulars he can only do so on terms, and this practice has been held to be applicable to actions for infringement of copyright in registered designs: *Morris Wilson & Co.* v. *Coventry Machinists Co.* (1)

(1) [1891] 3 Ch. 418.

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J. E. Fox, contrà, was not called on.

LORD ESHER, M.R. This was an action brought by the plaintiff against the defendant for infringement of the copyright in a design. Before the trial of the case came on, a summons was taken out by the defendant for leave to amend his particulars of defence. The judge allowed the application, and put the defendant under no terms. The question of costs was reserved. It is said we ought to overrule what the judge ordered, on the ground that, although it is admitted that the judge has discretion to make such an order and that there is no statutory limit to that discretion, yet a practice has grown up that under such circumstances the judge shall always impose certain conditions. The case of *Morris Wilson & Co.* v. *Coventry Machinists Co.* (1) was cited as an authority for that proposition. The case may not go so far; but it is cited in support of that proposition, and the question is whether, if it does so, we can agree with that decision. We have not to consider whether the conclusion arrived at in that case was right or wrong, but whether the principle enunciated was or was not erroneous. In the case of patents it was enacted by 15 & 16 Vict. c. 83, that particulars might be amended on such terms as should seem fit to the judge. This Act was repealed by the Patents, Designs, and Trade Marks Act, 1883; but by s. 29, sub-s. 5, particulars may be from time to time amended, by leave of the Court or a judge. That gives a discretion to the judge, and even if a practice has grown up in such actions as to the terms which should be imposed, it is erroneous, in point of law, to say that such a practice, however inveterate, can take away from a judge a discretion given by an Act of Parliament. If such a practice is of no avail in patent cases, it can have no effect in the case of actions in respect of designs as to which there is in the statute no special provision for delivery of particulars. We must, therefore, reject the alleged practice, and the question for our consideration would be, if we ought to set aside the exercise of discretion by the judge in this case. This has not really been contended for, and therefore the appeal must be dismissed.

(1) [1891] 3 Ch. 418.

BOWEN, L.J. I am of the same opinion. If the case cited really decided that the discretion vested in a judge was fettered by any practice that had sprung up, the answer has been conclusively given by the Master of the Rolls. It may be that the decision was not intended to go so far as the proposition for which it was cited; but in any event it is abundantly clear that no practice can impose a limit on the jurisdiction of a Court or judge.

A. L. SMITH, L.J. I agree, and have nothing to add.

Appeal dismissed.

Solicitors for plaintiff: *Harvey & Capron, for W. H. Speed, Nottingham.*

Solicitors for defendant: *Page & Scorer, for P. P. Truman, Nottingham.*

A. M.

SCAIFE *v.* KEMP & CO.

1892 *May* 6.

Practice—Discovery—Interrogatories—Defamation—Libel—Evidence in Mitigation of Damages—Order XXXVI., *r.* 37.

By Order XXXVI., r. 37, "In actions for libel and slander, in which the defendant does not by his defence assert the truth of the statement complained of, the defendant shall not be entitled on the trial to give evidence in chief, with a view to mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff, without the leave of the judge, unless, seven days at least before the trial, he furnishes particulars to the plaintiff of the matters as to which he intends to give evidence":—

Held, that where the defendant has, within the time limited by the rule, furnished particulars to the plaintiff of matters as to which he intends to give evidence in mitigation of damages, he is entitled to administer interrogatories to the plaintiff as to the matters referred to.

APPEAL against an order of Denman, J., reversing an order of a master, and directing that the plaintiff in an action for libel should answer the defendants' interrogatories.

It appeared that the plaintiff was an auctioneer carrying on business in Liverpool, and that the alleged libel consisted in a statement made by the defendants, who were trade protection

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and inquiry agents, to correspondents in Birmingham, in answer to an inquiry as to the plaintiff's credit and character. The defendants supposed that the inquiry related to another person of the same name who carried on business in Liverpool, and answered, "He is a bad payer, is frequently sued, and nothing can be got out of him." The statement of claim charged the defendants in the alternative with negligence in making the statement, and alleged that it had caused serious injury to the plaintiff's business and reputation.

The defence did not assert that the statement was true, but alleged that it was a privileged communication, and denied that the defendants had been guilty of negligence, and that the business and reputation of the plaintiff had suffered injury in consequence of the statement.

The information required in the interrogatories was as to whether or not cheques drawn by the plaintiff had been dishonoured, whether or not his goods had been taken in execution and distrained upon for rent, and whether or not actions had been brought against him for the price of goods sold to him, and on a dishonoured cheque. The defendants had furnished to the plaintiff, within, as the Court assumed, the time limited by Order XXXVI., r. 37 (1), particulars of matters as to which they intended to give evidence in mitigation of damages. Such particulars consisted of an affirmative statement of the facts as to which information was required in the interrogatories.

T. S. Little, for the plaintiff. The order of the master was in accordance with the practice at chambers. [He referred to Odgers on Libel and Slander, 2nd ed. p. 548, and to *Scott* v. *Sampson*. (2)]

Cleave, for the defendants, was not heard.

(1) By Order XXXVI., r. 37: "In actions for libel and slander in which the defendant does not by his defence assert the truth of the statement complained of, the defendant shall not be entitled on the trial to give evidence in chief, with a view to mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff, without the leave of the judge, unless, seven days at least before the trial, he furnishes particulars to the plaintiff of the matters as to which he intends to give evidence."

(2) 8 Q. B. D. 491.

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THE COURT (Mathew and A. L. Smith, JJ.) held that the interrogatories were rightly allowed, and dismissed the appeal.

Appeal dismissed.

Solicitor for plaintiff: *Walter H. Cowl, for Cowl & Watkins, Liverpool.*

Solicitors for defendants: *Stevens, Bawtree, & Stevens, for George Burn Lowe & Sons, Birmingham.*

H. D. W.

[IN THE COURT OF APPEAL.]

C. A.

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June 20.

SAUNDERS AND ANOTHER *v.* WIEL.

Practice—Interrogatories—Action for Penalties—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 58.

By s. 58 of the Patents, Designs, and Trade Marks Act, 1883, which prohibits infringements of copyright in registered designs, it is enacted that "Any person who acts in contravention of this section shall be liable for every offence to forfeit a sum not exceeding 50*l.* to the registered proprietor of the design, who may recover such sum as a simple contract debt by action":—

Held (affirming the judgment of the Queen's Bench Division), that a sum so forfeited must be taken to be a penalty, and that the plaintiff in an action to recover such a sum is not entitled to interrogate the defendant as to the infringements charged.

Adams v. *Batley* (18 Q. B. D. 625) distinguished.

APPEAL from a judgment of the Queen's Bench Division (Day and Charles, JJ.) (reported ante, p. 18).

The plaintiffs, who were registered under the Patents, Designs, and Trade Marks Act, 1883, as the proprietors of a certain design, sued the defendant to recover 100*l.* as penalties under s. 58 of that Act for infringement of their copyright in such design. The plaintiffs, the defendant not opposing, obtained leave to administer interrogatories, and in pursuance of such leave interrogated the defendant as to the commission of the infringements charged. The defendant objected to answer the interrogatories, on the ground that his answers might make him liable to the penalties sought to be recovered. The master disallowed the objection, and made an order that the defendant

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should answer. On appeal, Denman, J., referred the matter to the Court, who allowed the appeal. (1)

The plaintiff appealed.

Gwynne James, (*E. Morten*, with him), in support of the appeal, relied upon *Adams* v. *Batley* (2), and cited *Merrick* v. *Hundred of Ossulston* (3); *Earl Spencer* v. *Swannell* (4); *Chatterton* v. *Cave* (5); *Robinson* v. *Currey* (6); *Jones* v. *Jones* (7); *Hobbs* v. *Hudson*. (8)

Danckwerts, contrà, was not called on.

LORD ESHER, M.R. The question raised in this appeal is whether the action is brought for a penalty by way of a penalty —that is, by way of punishment, as it was put in the course of the argument. If it is so brought, it is admitted that interrogatories should not be administered to shew that the defendant has made himself liable to that penalty, and that if they are administered the defendant is not bound to answer them. The action is brought under the Patents, Designs, and Trade Marks Act, 1883, and it is quite plain that it is brought under s. 58. By that section, any person who acts in contravention of it "shall be liable for every offence to forfeit a sum not exceeding 50*l*." I do not deny that the use of the word "offence," like the use of the word "offender," is not in itself conclusive as to the penal nature of the section. It may be that the use of the word "forfeit," or the words "forfeit for every offence," is not conclusive; but the use of such expressions affords evidence of what the intention of the legislature was; and one would say primâ facie that the action was for a penalty. The expression, "a sum not exceeding 50*l*.," has been relied on, and it is said that the plaintiff must prove the amount of damage that he has sustained, as he would have to do in an action for damages. The true intention of the section seems to me to be that those words as to the amount to be recovered do not apply to the damage sustained by the plaintiff, but to the conduct of the defendant, which the

(1) Ante, p. 18.
(2) 18 Q. B. D. 625.
(3) Rep. t. Hardw. 409.
(4) 3 M. & W. 154.
(5) 3 App. Cas. 483.
(6) 7 Q. B. D. 465.
(7) 22 Q. B. D. 425.
(8) 25 Q. B. D. 232.

jury may take into consideration. For example, in the case of infringement by accident or through a mistake, the jury might assess the penalty to be recovered at a less sum than the statutory limit of 50*l*. We cannot, however, properly construe s. 58 without looking at s. 59. By that section: "Notwithstanding the remedy given by this Act for the recovery of such penalty as aforesaid, the registered proprietor of any design may (if he elects to do so) bring an action for the recovery of any damages arising" from the various matters of infringement mentioned in the section. There is thus a distinction drawn, and the only sensible interpretation of the statute is that the two sections apply to two distinct remedies, the one by way of penalty, the other by way of damages.

It is said, however, that we ought to hold otherwise; because, Lush, L.J., in *Robinson* v. *Currey* (1), quoted *Merrick* v. *Hundred of Ossulston* (2), and said that in that case it was stated, "the Court held that where an Act of Parliament only gives a remedy to the party grieved, that is not to be considered a penal action." Put in that way it would seem that that was the holding of the Court in that case; but that is not so, for it is a statement of what was said by Lee, C.J., in giving judgment, as to the decision reported in Strange. (3) I cannot think that is a sufficient authority, especially since, as my brother Bowen points out, it has never been accepted as law. Mr. James relied principally on *Adams* v. *Batley* (4), decided on 3 & 4 Wm. 4, c. 15, s. 2. The statute is wholly different from the one we are considering, and we arrived at a conclusion that the action in that case was not to recover a penalty, but for damages. That conclusion was arrived at by looking at the context, which, though the word "offender" was used, took away from it its primâ facie meaning and left the action one for damages. In the present case there is nothing in the context to alter the ordinary meaning of the words used in s. 58; but on the contrary s. 59 fortifies the view that they are to be taken with their ordinary meaning. The section therefore relates to penalties alone, and interrogatories tending to shew that the defendant

(1) 7 Q. B. D. 465.
(2) Rep. t. Hardw. at p. 412.
(3) *Smith* v. *Phillips*, Stra. 136.
(4) 18 Q. B. D. 625.

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has subjected himself to those penalties need not be answered. The appeal must, therefore, be dismissed.

BOWEN, and A. L. SMITH, L.JJ., concurred.

Appeal dismissed.

Solicitors for plaintiffs: *Gresham, Davies, & Dallas.*
Solicitors for defendant: *Maddisons.*

A. M.

C. A. 1892 *June* 20.

[IN THE COURT OF APPEAL.]

WILLIS & CO. *v.* BADDELEY.

Practice—Discovery—Principal Resident Abroad—Action in Name of Agent—Staying Action till Discovery made.

Where the agent of a principal resident abroad brings an action in his own name, and on a contract made with him as agent, the defendant is entitled to discovery to the same extent as if the principal were a party to the action, and to have the action stayed till such discovery is made.

APPEAL from an order of the Queen's Bench Division on an application for discovery made to a master, but refused by him, and referred by a judge at chambers to the Court.

The action was brought by the plaintiffs upon a policy of marine insurance effected by them as agents for La Compagnie des Assurance Générales de Trieste, and subscribed by the defendant for 100*l.* The policy was a reinsurance of a policy subscribed by the Trieste Company for a larger amount. The defendant applied to a master for an order that the Trieste Company "do within twelve days, by their secretary or other proper officer, answer an affidavit stating what documents are or have been in their possession or power relating to the matters in question in this action; and that in the meantime all further proceedings in this action be stayed." The master refused to make the order. On appeal to a judge at chambers no order was made, and a further appeal to the Divisional Court was dismissed.

The defendant appealed.

A. T. Lawrence, and *Hollams*, in support of the appeal. The defendant is asking for discovery of documents which the Trieste Company would have been bound to disclose had they been plaintiffs on the record. The Court below decided against the application on the ground that the policy was a reinsurance, and on the authority of an unreported case of *Nord Deutsche Versicherungs Gesellschaft* v. *Merchants' Marine Insurance Co., Limited* (1), in which it was decided that an order for ship's papers would not be made in a case of reinsurance. In this case the plaintiff on the record was agent for the Trieste Company, who are parties to the action within the meaning of Order XXXI., r. 12, and the definition in the Judicature Act, 1873, s. 100, that "party" shall include every person served with notice of or attending any proceeding, although not named on the record." Even if the Trieste Company are not parties to the action, they are a foreign corporation suing through their agent, and the principle laid down in *Republic of Costa Rica* v. *Erlanger* (2) applies, and the action should be stayed till discovery is given.

[They cited also: *China Steamship Co.* v. *Commercial Assurance Co.* (3); *United States of America* v. *Wagner* (4); *Fraser* v. *Burrows* (5); *West of England Bank* v. *Canton Insurance Co.* (6)]

Joseph Walton, contrà. There is no precedent for such an application. The Trieste Company are not in any sense parties to the action; they are not served, and do not attend the proceedings. The Court has no power to order the plaintiff to obtain an affidavit from persons outside the action, and to stay his proceedings if he does not do so.

LORD ESHER, M.R. I do not desire to confine what I am about to say to cases of insurance; I am prepared to decide that where it is made known to the Court that there is a foreign principal residing abroad who is the real plaintiff in the action and is only suing through his agent here, and that the agent was dealt with by the other side as agent and not as principal, then, in order to prevent palpable injustice, the Court by reason of its

(1) Feb. 1, 1890, before Mathew and Cave, JJ.
(2) 1 Ch. D. 171.
(3) 8 Q. B. D. 142.
(4) Law Rep. 2 Ch. 582.
(5) 2 Q. B. D. 624.
(6) 2 Ex. D. 472.

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Lord Esher, M.R.

inherent jurisdiction will insist that the real plaintiff shall do all that he ought to do for the purposes of justice as if his name were on the record. It is true that the Court cannot make an order on him such as is here asked for, because he is not a party to the action; but it can say that the nominal plaintiff shall not proceed with the action till the real plaintiff has done that which, had he been a party to the action, he might have been ordered to do. Applying that principle to the present case, we ought to order that the action shall be stayed until an affidavit of documents is made which the Trieste Company would have been obliged to make had they been the plaintiffs on the record. This is not a case, as has been suggested, of what is sometimes called judge-made law. There is, in fact, no such thing as judge-made law, for the judges do not make the law, though they frequently have to apply existing law to circumstances as to which it has not previously been authoritatively laid down that such law is applicable. We are acting, in making this order, on an appreciation of the rule laid down in the case of *Republic of Costa Rica* v. *Erlanger*. (1) There James, L.J., in giving judgment in the case of a suit by a foreign government, said: "The Court can, for the purpose of doing justice, say to the original plaintiff, 'We will stop your proceedings until you have named some proper person to give the discovery which is sought by the defendant from you.'" The principle which was there enunciated should govern the present case, and the appeal must be allowed.

BOWEN, L.J. I quite agree, and I have nothing to add, except that if the same point arises as to ship's papers which arose in the unreported case that has been mentioned, I should desire to reserve my opinion as to whether I could agree with that decision.

A. L. SMITH, L.J. I am of the same opinion. It seems to me that the principle inherent to the jurisdiction of every Court as regards this practice is that it should be framed so as to do justice, and that if we did not stay this action until the discovery

(1) 1 Ch. D. 171.

sought is made, as the action is brought by a nominal plaintiff for and on behalf of and as agent for the Trieste Company, we should be doing that which is not justice between the parties. As to the point that arose of the right of a defendant to ship's papers in an action on a reinsurance, I agree with Bowen, L.J., that that must be left open.

Appeal allowed.

Solicitors for plaintiffs: *Waltons, Johnson, Bubb, & Whatton.*
Solicitors for defendant: *Hollams, Sons, Coward, & Hawksley.*

A. M.

[IN THE COURT OF APPEAL.]

BLEWITT *v.* TRITTON AND OTHERS.

Practice—Stamp—Ruling of Judge—Application for Nonsuit, or to enter Judgment, or for a New Trial—Order XXXIX., *r.* 8.

Where a judge, trying an action without a jury, rules that the stamp upon any document is sufficient, or that the document does not require a stamp, the decision is final, and no appeal lies to the Court of Appeal by way of application for a nonsuit, or to enter judgment, or for a new trial.

APPEAL from a judgment of a judge of the Queen's Bench Division trying the action without a jury.

The action was brought by the payee of a promissory note for 216*l.* against the defendants as indorsers. Judgment went by default against all the defendants except one named Le Grand. At the trial the promissory note was tendered in evidence, and it appeared that it had a penny adhesive stamp. Objection was taken to the sufficiency of the stamp; but the learned judge admitted the document and gave judgment for the plaintiff.

The defendant Le Grand appealed.

W. Higgins, in support of the appeal. The learned judge was wrong in admitting the note, as by the schedule to the Stamp Act, 1870 (33 & 34 Vict. c. 97), it ought to have had an ad valorem stamp. By s. 54 such a defect cannot be cured; and the judge, though he admitted the document, should have given no effect to it, as it was not evidence to prove the receipt of the money: *Ashling* v. *Boon*. (1) In the absence of evidence based on the promissory note there was no evidence to go to the jury, and the

(1) [1891] 1 Ch. 568.

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defendant is entitled to claim that judgment should be entered for him.

Houghton, contrà, was not called on.

LORD ESHER, M.R. If this case had been tried by a jury and the point were capable of being raised, it could only be raised on an application for a new trial. The Common Law Procedure Act dealt with this, and directed that no new trial should be granted by reason of the ruling of a judge that the stamp upon any document is sufficient, or that it does not require a stamp. The matter came before the Court of Exchequer in *Siordet* v. *Kuczynski* (1), and it was held that there was no appeal even in a case where the judge at the trial reserved the point as to the sufficiency of the stamp, because, as Willes, J., said, the intention of the statute was, that all questions as to stamps should be fully disposed of at Nisi Prius. In that case the judge ruled that a bill was admissible, but reserved the point for the opinion of the Court; but the Court held that the question of the validity of a stamp objection, where the document was admitted, rested solely with the judge at the trial without appeal. The only question in this case is whether, the same words having been applied in the rules and orders to cases tried by a judge without a jury as to cases tried by a judge and a jury, we ought not to apply them in the same sense to both kinds of trial. In my opinion we ought to do so, and cannot in either case entertain the question whether the ruling of the judge was right or wrong. The appeal must, therefore, be dismissed.

BOWEN, L.J. I am of the same opinion. The question turns on the true construction of Order XXXIX., r. 8. That rule has an historic origin. In former days an objection to the sufficiency of a stamp on a bill of exchange was pleadable in bar, and a wrong ruling of the judge at Nisi Prius could be challenged by motion for a new trial, or by motion (if leave had been reserved) to enter a nonsuit or verdict for the defendant. Then came the Common Law Procedure Act, which enacted "no new trial shall be granted by reason of the ruling of any judge that the stamp upon any document is sufficient, or that the document does not require a stamp." The Courts put on that enactment the construction

(1) 17 C. B. 251.

that the legislature intended that that should not be done indirectly which could not be done directly, and that the decision of the judge that a stamp was sufficient must be final in all cases. In *Siordet* v. *Kuczynski* (1) the learned judge ruled upon a stamp objection that a bill was admissible, but reserved the point for the opinion of the Court. Serjeant Byles, in pursuance of leave reserved, obtained a rule nisi for a new trial or for a nonsuit, but the Court discharged the rule. Willes, J., laid down that when "a document has passed the ordeal of an investigation at Nisi Prius as to its liability to stamp duty, or the sufficiency of the stamp, it should be subject to no further discussion." This was not merely interpreting s. 31 of the Common Law Procedure Act, 1854, as preventing a new trial in such a case, but as equally efficacious to prevent the entry of a nonsuit or a verdict for the defendant. The same view was taken in *Cory* v. *Davis*. (2) The section of the statute is repeated in Order XXXIX., r. 8, and it seems to me to be clear that in introducing the rule it was intended that it should act in the same manner as the statute had acted. A moment's consideration will shew that this must be so. If the judge admits a bill of exchange or promissory note on which the plaintiff considers he can safely rely, the plaintiff may rest his case there, although he may have other documents or evidence to support it. To hold that the Court of Appeal cannot order a new trial, but must direct the entry of a verdict for the defendant or a nonsuit, would place the plaintiff in a position of great embarrassment, and might lead in many cases to injustice. This cannot be the true construction of the rule, for the Court of Appeal ought not to enter judgment unless all the evidence in a case is exhausted. I come, therefore, to the conclusion that the rule intended that the decision of the judge in favour of the sufficiency of the stamp should be final and not open to review.

KAY, L.J. I agree, and have nothing to add.

Appeal dismissed.

Solicitors for plaintiff: *Blewitt & Tyler.*

Solicitors for defendants: *Beall & Co.*

(1) 17 C. B. 251.

(2) 14 C. B. (N.S.) 370.

A. M.

C. A.

1892

Feb. 6, 8; *April* 9.

[IN THE COURT OF APPEAL.]

GREEN *v.* MARSH.

Bill of Sale—Registration—Attornment Clause in Mortgage—New Demise by Mortgagor—Possession by Mortgagee—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 6—*Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 3, 8, 9, 15.

In 1886 W. mortgaged the premises of which he was in occupation by a deed containing an attornment clause, whereby he agreed to become tenant to the mortgagee at a rent equal in amount to the interest on the mortgage debt and payable quarterly; and by the deed a power of distress in case of non-payment was given to the mortgagee.

In 1890 W., by letter written to the mortgagee, acknowledged that he held the premises in his occupation as tenant to the mortgagee at a weekly rent slightly in excess of the interest on the mortgage, admitted arrears of rent to be due, and undertook to deliver up possession of the premises at any time on four weeks' notice.

The mortgage deed and the letter were neither of them registered under the Bills of Sale Acts:—

Held, by the Court of Appeal (Halsbury, L.C., and Lindley and Kay, L.JJ.), affirming the judgment of Wright, J., that the attornment clause in the mortgage deed and the letter of January, 1890, modifying it, must be deemed to be bills of sale, and were void, under s. 8 of the Act of 1882, for want of registration.

Appeal from a judgment of Wright, J., at a trial without a jury of an action for conversion.

By s. 6 of the Bills of Sale Act, 1878, "Every attornment, instrument, or agreement, not being a mining lease, whereby a power of distress is given, or agreed to be given, by any person to any other person by way of security for any present, future, or contingent debt or advance, and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance, or otherwise for the purpose of such security only, shall be deemed to be a bill of sale, within the meaning of this Act, of any personal chattels which may be seized under such power of distress; provided that nothing in this section shall extend to any mortgage of any estate or interest in any land, tenement, or hereditament which the mortgagee, being in possession, shall have demised to the mortgagor as his tenant at a fair and reasonable rent."

In 1886 Charles Wilson mortgaged his premises, Nos. 120 and 122 Kentish Town Road, to the Mortgage Insurance Corporation, Limited, to secure 5000*l.* and interest at 5 per cent. The mortgage deed contained an attornment clause, whereby Wilson, the mortgagor, being in occupation of the house, agreed to become tenant to the mortgagees at a rent of 250*l.* per annum (which was the amount of the annual interest on the mortgage debt) to be paid quarterly; and by the deed an express power of distress was given to the mortgagees in case of non-payment. In May, 1887, Wilson, the mortgagor, entered into a hiring agreement with the Plaintiff, Mrs. Green, under which he obtained possession of and took to his premises a chamber organ belonging to her. This agreement was dated May 18, 1887, and its material terms were that Wilson should pay the plaintiff the sum of 60*l.* by quarterly instalments of 5*l.* a quarter, and that in case any payment should be unpaid for twenty-one days after it was due, Wilson should return and deliver up possession of the organ to the plaintiff, and pay all hire due up to the date of the return. A modification of the arrangement between the mortgagees and Wilson was afterwards effected by a letter, dated January 10, 1890, and written by Wilson to the mortgagees, which was, so far as material, to the following effect: "I acknowledge to hold the premises, occupied by me and on mortgage to the Mortgage Insurance Corporation, Limited, as tenant of the corporation, at a weekly rent of 5*l.*; and I admit that at this date there is due from me for arrears of rent the sum of 200*l.*, and a week's rent, on Monday, the 13th instant. Further, that, upon four weeks' notice at any time, I undertake to quit and deliver up possession of the premises in consideration of the time given me to endeavour to make other arrangements." Neither the mortgage deed nor this letter was registered under the Bills of Sale Acts.

In September, 1890, the mortgagees, as Wilson's landlords, distrained upon the premises, Nos. 120 and 122 Kentish Town Road, for 247*l.*, of which 47*l.* was for arrears of the weekly rent of 5*l.* Under the distress they seized (inter alia) the organ, and sold it by public auction, notwithstanding the protest of the plaintiff's agent. At that time two of the instalments of the price of the organ were overdue.

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This action was brought, in October, 1890, by the plaintiff against the auctioneer and the purchaser of the organ for wrongfully depriving the plaintiff of the organ, for return of the same or its value, and for damages. At the trial the right to the organ turned upon the question whether the document of January 10, 1890, required registration under the Bills of Sale Act; and it was found by Wright, J. (1.) that the hiring agreement did not pass the property in the organ to Wilson; (2.) that the so-called rent of 250*l.* was not in 1886 more in amount than a fair and reasonable rent for the premises, but that such rent was reserved or made payable only as a mode of security and providing for the loan and for the payment of interest on the loan; and (3.) that the mortgagees were not in possession at the date of the deed. The learned judge held accordingly, that the deed was within the first part of s. 6 of the Bills of Sale Act, 1878, and was not protected by the proviso, and required registration. With regard to the letter of January 10, 1890, the learned judge found that this document came into existence merely for the purpose of defeating the law, as laid down in *In re Willis* (1), and was colourable only in so far as it purported to alter the former arrangement, and that there was no change of possession and no intention to make a real demise, or to alter the substance of the former arrangement. That there was not sufficient evidence that the fall which appeared to have taken place in the value of the premises had rendered 250*l.* more than a fair and reasonable rent for the premises. The result was that the document of 1890 was within the first part of s. 6 of the Act of 1878, and not within the proviso because it was not a mortgage, and was not a demise by the mortgagee in possession. Moreover, as the power of distress (if any) created by it was a merely conventional right to distrain, not for rent alone, but for an existing debt, the power would not extend to goods of strangers—at any rate, in so far as the power might be exercised in respect of the antecedent debt.

The defendants appealed.

Cooper Willis, Q.C., and *Newson*, for the appellants. This is the case of a mortgage, with power of distress, of an interest

(1) 21 Q. B. D. 384.

in a tenement which the mortgagee, being in possession, has demised to the mortgagor at a fair and reasonable rent; it consequently comes within the proviso at the end of s. 6 of the Act of 1878. The case of *In re Stockton Iron Furnace Co.* (1) shews that the mortgagees were, by virtue of the attornment clause, mortgagees in possession.

But if, after the decision in *In re Willis* (2) it cannot be contended that the attornment clause in the mortgage of 1886 would come within the exception from s. 6, it may be urged that the document of January 10, 1890, was a new demise with incidents differing from those of the former tenancy. It altered the periods for the payment of rent from quarterly to weekly, it acknowledged a large arrear of rent, and gave the mortgagees power to enter upon giving four weeks' notice. The interest being in arrear, the mortgagees had the right to take possession, and this demise must be taken to have been made by mortgagees in possession, for they could not have made it without, at all events, constructively taking possession. Actual physical taking of possession is not necessary; constructive possession is enough. The mortgagees are clearly not within the decision in *In re Willis.* (2) If the new demise had been to some one else there would have been no question. Here the mortgagees out of consideration let the premises to the mortgagor himself, but the principle remains the same. Again, the distress in this case was not made under the original mortgage or the attornment clause; it was made under the new tenancy by virtue of the common law right of distress, and so was not within the section. The organ, moreover, did not belong to the grantor of the bill of sale at all, and the words of the Act only apply to the goods of the grantor. A bill of sale cannot cover the goods of anybody but the grantor; and as the organ was not Wilson's property, the registration of the document of January 10, 1891, as a bill of sale could not have affected it.

[KAY, L.J. Does not the Act apply to goods in respect of which credit might be given to him as a man of substance?]

The Act of 1882 cannot apply to such a document as this; but if it does, then the repealing section (s. 15) applies, s. 6

(1) 10 Ch. D. 335. (2) 21 Q. B. D. 384.

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is repealed, and the document is not void as against anybody. On all these grounds it is contended that the instrument of January 10, 1890, is not a bill of sale, and does not require registration, and that the sale under the distress was good. [They also referred to *Hill* v. *East and West India Dock Co.* (1)]

Channell, Q.C., and *Stephen Lynch*, for the plaintiff, were not called upon.

April 9. KAY, L.J., delivered the judgment of the Court. After stating the facts of the case, the Lord Justice continued:—The plaintiff sues the defendants to recover the organ in question or for damages. It was argued that she had no right to sue because the organ was not hers. This argument fails. The property would not pass under the hire-and-purchase agreement until all instalments of the purchase-money were paid, and these instalments were not all paid at the time of the distress.

Then it is said that the lease under which this distress was made was void under the provisions of the statutes of 1878 and 1882 relating to Bills of Sale. The case comes within s. 6 of the Act of 1878, unless excepted by the provision at the end of that section. The first words of that section, "every attornment, instrument, or agreement not being a mining lease," clearly apply to other leases "whereby a power of distress is given or agreed to be given" (which includes such a power given by law and not expressly) "by way of security for" a present or future debt or advance.

It was urged, however, that s. 6 is practically repealed by the Act of 1882. Sect. 15 repeals—at any rate as to bills of sale given as security for money—s. 8 of the Act of 1878, which made unregistered documents which were bills of sale under the Act of 1878 void against assignees in bankruptcy and execution creditors. Sect. 9 of the Act of 1882 avoids bills of sale given as security for money which are not according to the form in the schedule. This agreement between the mortgagee and mortgagor, it is said, could not be made in that form, and therefore it cannot be intended that it should be within the Act of 1882.

(1) 9 App. Cas. 448, 464.

The answer is, the two Acts are to be construed together under s. 3 of the Act of 1882. This arrangement, being for the security of money, is within the mischief which both Acts seek to prevent, being a secret power of distress. By s. 9 of the Act of 1882, it would be void because it is not according to the scheduled form if it is a bill of sale. But it is only to "be deemed to be a bill of sale" of the chattels that might be distrained under it, according to s. 6 of the Act of 1878. That must mean that it is not a bill of sale, but it is to be treated as one for the purpose of registration. If unregistered it would be void as to the chattels comprised in it, under s. 8 of the Act of 1882. But not being actually a bill of sale, it need not be according to the scheduled form, because s. 9 does not apply to it.

Then it was argued that the Bills of Sale Acts were only intended to apply to the chattels belonging to the grantor of the bill of sale. But, if the effect of them is to avoid the power of distress, the defendant has wrongfully seized the plaintiff's organ.

The main point argued was, that the distress is good because it is within the exception of the proviso at the end of s. 6 of the Act of 1878. The agreement of June 10, 1890, was, it is urged, a lease granted by a mortgagee being at the time in possession. It was decided in *In re Willis* (1) that, to bring a case within the exception, it was necessary that the mortgagee should first take possession of the mortgaged premises, and should then demise them to the mortgagor; the case intended to be excepted being that of a bonâ fide lease by a mortgagee in possession to a mortgagor, not a lease to secure money. The broad answer seems to be that this arrangement was not such a lease as is intended to be excepted, but was a pretended lease made for the purpose of obtaining a power of distress as a further security for the interest of the mortgage debt. The argument, which was ingenious, fails on this ground, even if the several steps of it could be supported. But those steps seem also to be unsound. It was admitted that after the case of *In re Willis* (1) the original attornment clause, as it is called, in the mortgage of

(1) 21 Q. B. D. 384.

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Kay, L.J.

1886 would not be within the exception, because the mortgagee had not been in possession when that deed was executed. But it was said the attornment clause made him mortgagee in possession under the decision in *In re Stockton Iron Furnace Co.* (1), and the arrangement in June, 1890, altering the times for paying the rent from quarterly to weekly payments, and giving the mortgagee power to enter upon four weeks' notice, was a new demise, and was therefore a demise by a mortgagee in possession. This argument cannot prevail. The attornment clause was not such a taking possession by the mortgagee as was contemplated by the proviso, though no doubt it would render him liable to account at the suit of a subsequent mortgagee for all the rent agreed to be paid by the mortgagor which might be unreceived owing to the mortgagee's wilful default. But this attornment clause, not being registered, was void. Even if it had been valid, the arrangement in 1890 was not a new demise, but only a modification of the so-called attornment clause.

The whole proceeding is an attempt to keep secret the power of distress, which was not a power to secure a real rent, but to secure the interest of the mortgage debt.

The true conclusion, for the reasons given, is that the attornment clause and the letter subsequently modifying it should be deemed to be bills of sale of the chattels that might be distrained under them respectively, and are void as to such chattels by s. 8 of the Act of 1882, because they are not registered.

The appeal must be dismissed with costs.

LINDLEY, L.J. Lord Halsbury and I have read the judgment just delivered by Kay, L.J., and we both concur in it.

Appeal dismissed.

Solicitors: *Pridham; A. Scott Lawson.*

(1) 10 Ch. D. 335.

W. W. K.

[IN THE COURT OF APPEAL.]

C. A.
1892
April 7, 8.

LEE *v.* DANGAR, GRANT & CO.

Sheriff—Execution—Concurrent Writs of fi. fa.—Penalty under Sheriffs Act, 1887 (50 & 51 *Vict. c.* 55), *s.* 29—*Overcharge by Mistake—Demand—Condition Precedent—Order as to Fees under Sheriffs Act*, 1887.

The Sheriffs Act, 1887, by s. 29, imposes a penalty of 200*l.* upon any sheriff's officer who (inter alia) "takes or demands any money or reward under any pretext whatever, other than the fees or sums allowed by or in pursuance of this or any other Act," or "is guilty of any offence against or breach of the provisions of this Act":—

Held, that the penalty is inflicted for the doing of an act in the nature of a criminal offence; that to constitute such an offence there must be a mens rea; and that, consequently, a sheriff's officer is not liable to the penalty if he makes an overcharge by mistake.

In order to constitute an offence under the Act, it is not necessary that the improper demand or taking of money should be made a condition precedent to the officer's doing his duty.

Opinion of Cave, J., in *Trustee of Woolford's Estate* v. *Levy* ([1892] 1 Q. B. at p. 776), dissented from.

An execution debtor brought an action against the execution creditors, their solicitors, and the sheriff's officers for the county of London, for alleged illegal conduct in levying execution. The solicitors had issued two writs of fi. fa. for the amount of the judgment debt and costs, one directed to the sheriff for the City of London, the other to the sheriff for the county of London, and had given each set of sheriff's officers notice of the other writ, and requested them to be careful to prevent a double execution. Possession was taken under both writs. The execution in the city of London having been paid off, the sheriff's officers for the county of London demanded from the plaintiff payment of a sum which consisted in part of fees payable by the execution creditors, and did not withdraw till payment of this amount had been made under protest. They also claimed, but did not insist on, the payment of poundage. There was no evidence of malice on the part of either the execution creditors or their solicitors, or of want of reasonable cause for the course adopted:—

Held (affirming the decision of Denman, J.), ([1892] 1 Q. B. 231), that neither the issue of, nor the seizure under, the two writs of fi. fa. was illegal; that the sheriff's officers for the county of London were not entitled to poundage; that they were liable to the plaintiff in nominal damages for not having sooner withdrawn; but that they were not liable to the penalty of 200*l.* under s. 29 of the Act.

APPEAL by the plaintiff against the judgment of Denman, J. (1)

(1) [1892] 1 Q. B. 231.

UNIVERSITY Burlington Gardens, LONDON, W.

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The action was brought by the plaintiff, a judgment debtor, against Dangar, Grant & Co., the judgment creditors; Hollams & Co., their solicitors; and Nathan & Co., the sheriff's officers for the county of London; for alleged illegal conduct in relation to the levying of execution. On April 15, 1890, Dangar & Co. recovered judgment in an action against the plaintiff for 2328*l.* 13*s.* 9*d.*, debt and costs. On April 21 two writs of fi. fa. were issued by Hollams & Co., one writ being directed to the sheriff of the City of London, and the other to the sheriff of the county of London, in each of which places the plaintiff had a place of business. Both writs were indorsed by Hollams & Co. in the same terms—viz., "To levy 2328*l.* 13*s.* 9*d.*, and 1*l.* 2*s.* 6*d.* for costs of execution, and interest on 2328*l.* 13*s.* 9*d.* at 4 per cent. from April 15, besides sheriff's poundage, officer's fees, costs of levying, and all other legal incidental expenses." On the same day these writs were lodged with the sheriffs respectively, and the clerk of Hollams & Co., in lodging them, told the officers of each sheriff of the writ issued to the other sheriff, at the same time telling them to be very careful to prevent a double execution for the amount. On the same day the officers of each sheriff took possession under his writ, and the City sheriff's officers wrote to Hollams & Co., informing them that they had taken possession, and adding, "We are informed by the manager that the stock at the Cannon Street premises is valued at between 7000*l.* and 8000*l.*" On April 30 the plaintiff paid off the execution in the City, the sum of 2400*l.* 7*s.* 3*d.* being paid to the sheriff's officers. Of this amount they at once forwarded 2332*l.* 11*s.* 3*d.* to Hollams & Co. This sum was made up of 2328*l.* 13*s.* 9*d.* judgment debt and costs, 1*l.* 5*s.* for the writ, and 2*l.* 12*s.* 6*d.* for interest. The sheriff's officers retained 60*l.* 14*s.* for poundage, 2*l.* 2*s.* for levy fees, and 5*l.* for possession money. Hollams & Co. wrote to the City sheriff's officers, acknowledging the receipt of the 2332*l.* 11*s.* 3*d.*, "the amount of the levy herein." Hollams & Co. also at once wrote to Nathan & Co. (the officers of the sheriff of the county of London), informing them of the payment made in the City, and requesting them to withdraw from possession "on payment of the costs of the execution and the sheriff's and your charges." This letter was received by Nathan & Co. on the morning of

May 1, and they on that day ordered the man in possession to withdraw on payment of possession-money and 63*l.* 2*s.* No question arose in the present action about the possession-money. The 63*l.* 2*s.* was made up of 1*l.* 2*s.* 6*d.* for the writ, 1*l.* 1*s.* for the levy fee, 4*s.* mileage, and 60*l.* 14*s.* poundage. On May 2 the plaintiff's solicitors sent a cheque for 63*l.* 2*s.* to Nathan & Co. under protest, saying that their client was not legally liable to pay that sum. This cheque was returned by the messenger who brought it. On the same day Nathan & Co. wrote to the plaintiff's solicitors, stating that they found the poundage had been already paid, and inclosing an order to their man to withdraw from possession on payment of Hollams & Co.'s costs of writ of fi. fa., 1*l.* 2*s.* 6*d.*; levy fee, 1*l.* 1*s.*; and 4*s.* for mileage; in all 2*l.* 7*s.* 6*d.*; and the same evening the man withdrew on payment of that amount.

The plaintiff's solicitors contended that the execution in the county of London was an "abortive" execution, and that the sheriff's officers were not entitled to demand any part of the 2*l.* 7*s.* 6*d.*, and that their man ought to have withdrawn from possession without insisting on that payment.

The plaintiff alleged that Dangar & Co. and their solicitors were guilty of an illegal act in issuing two writs concurrently for the whole amount due under the judgment, one in the City of London, and the other in the county of London, and the plaintiff claimed damages against both the judgment creditors and their solicitors. The plaintiff claimed against the sheriff's officers 200*l.* penalty, under s. 29 of the Sheriffs Act, 1887, for extortion, first in demanding poundage, and secondly, in demanding the 2*l.* 7*s.* 6*d.* after they were aware that the full amount of the execution had been levied on the writ issued into the City. The plaintiff also claimed damages from the sheriff's officers, on the ground that they were trespassers in remaining too long in possession.

Denman, J., held that neither the issue of the two writs, nor the seizure under them both, was illegal, and he gave judgment for the execution creditors and their solicitors with costs. The learned judge also held that the sheriff's officers were not liable to any penalty under the Sheriffs Act, but that they were liable to the plaintiff in nominal damages for not having sooner withdrawn

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from possession, and he gave judgment for the plaintiff against Nathan & Co. for one farthing, without costs.

The plaintiff appealed, and there was a cross appeal by the defendants Nathan & Co. from the judgment against them.

Barnes, Q.C., and *C. Johnston Edwards*, for the plaintiff. A judgment creditor is not entitled to issue concurrent writs of execution. At any rate he is not entitled to have concurrent writs executed in different places, when the goods seized in one place are amply sufficient to satisfy the judgment. Under such circumstances he is bound to see that the second writ is not executed until the first is returned. He cannot have a right to act unreasonably, by directing a further levy, when an ample levy has been already made. The seizure under one writ is a discharge of the debt *pro tanto*: *Wilbraham* v. *Snow* (1); *Clerk* v. *Withers* (2); *Slie* v. *Finch*. (3) The evidence in the present case shews that the goods seized in the City were much more than sufficient to satisfy the judgment debt, and the solicitors of the judgment creditors were so informed. That being so, it was unreasonable to seize goods under the other writ, and, if they were seized, the sheriff ought to have at once withdrawn from possession so soon as it was known that enough had been seized in the City.

[They also cited on this point: *Ex parte Williams* (4); *Gawler* v. *Chaplin* (5); *Ex parte Ford* (6); *Chapman* v. *Bowlby* (7); *Miller* v. *Parnell* (8); *Hodgkinson* v. *Whalley* (9); Tidd's Practice, 8th ed. pp. 1019, 1032; Lush's Practice, 3rd ed., vol. 2, p. 583; Archbold's Practice, 11th ed., p. 593; *Dunn* v. *Harding* (10); *Shoppee* v. *Nathan & Co.* (11)]

Secondly, the sheriff's officers improperly demanded money from the plaintiff other than the fees to which they were entitled, within the meaning of s. 29 (12) of the Sheriffs Act, 1887; and

(1) 2 Wm. Saund. 47 a, note 1.
(2) 6 Mod. 290.
(3) 2 Roll. Rep. 57.
(4) Law Rep. 7 Ch. 314.
(5) 2 Ex. 503.
(6) 18 Q. B. D. 369, 371.
(7) 8 M. & W. 249.
(8) 6 Taunt. 370.
(9) 2 C. & J. 86.
(10) 2 Dowl. 803.
(11) [1892] 1 Q. B. 245.
(12) By the Sheriffs Act, 1887, s. 20, sub-s. 2: "Any sheriff or officer of a sheriff concerned in the execution of process directed to the sheriff—may demand, take and receive such fees

therefore they are liable to the penalty imposed by that section. They demanded poundage on the execution in the county, though it was clearly not payable. They subsequently withdrew the demand, it is true, but that is immaterial. They also demanded, and actually received, other charges amounting to 2*l.* 7*s.* 6*d.*, to which they were not entitled.

Finlay, Q.C., and *A. T. Lawrence*, for the judgment creditors and their solicitors. The issuing of concurrent writs is clearly legal, and when they are issued execution may be levied under them all. Neither *Slie* v. *Finch* (1), nor any of the other cases

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and poundage as may from time to time be fixed by the Lord Chancellor, with the advice and consent of the judges of the Court of Appeal and High Court of Justice or any three of them, and with the concurrence of the Treasury."

By sub-s. 3: "Any sheriff or officer of a sheriff, and any officer arresting or having in custody any person by virtue of any action, writ, or attachment, shall not demand or take any reward to do his office, except such remuneration as is given to the sheriff by the Crown, or is given to an officer of the sheriff by the sheriff, and such fees and poundage as are above mentioned or are allowed by or in pursuance of any other Act, and, save as allowed by this Act, shall not demand or take directly or indirectly any reward for doing his office or duty or for abstaining therefrom, or in respect of the mode in which he does his office or duty."

By s. 29, sub-s. 2: "If any person being a sheriff, under-sheriff, bailiff, or officer of a sheriff, does any of the following things, that is to say—

(*b*) takes or demands any money or reward under any pretext whatever other than the fees or sums allowed by or in pursuance of this or any other Act; or

(*d*) is guilty of any offence against or breach of the provisions of this Act, or of any wrongful act or neglect or default in the execution of his office, or of any contempt of any superior Court;

he and any person procuring the commission of any such offence shall, without prejudice to any other punishment under the provisions of this Act, but subject as hereinafter mentioned, be liable—

(i) to be punished by the Court as hereinafter mentioned; and

(ii) to forfeit two hundred pounds, and to pay all damages suffered by any person aggrieved,

and such forfeiture and damages may be recovered by such person as a debt by an action in Her Majesty's High Court of Justice."

The order as to fees, dated August 31, 1888, made under the Sheriffs Act, 1887 (vide the Annual Practice, 1892, vol. ii. p. 198), fixed "the fees set forth in the schedule thereto annexed as the fees to be demanded, taken, and received by any sheriff or officer of a sheriff concerned in the execution of process directed to the sheriff in the several proceedings mentioned in the said schedule as from the date of the order."

(1) 2 Roll. Rep. 57.

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cited, shews that seizure under a fi. fa. is a satisfaction of the debt. The observations made by the judges in *Slie* v. *Finch* (1) must be taken in connection with the facts of that case. No action lies for excessive seizure simpliciter; an action will lie only for putting in force the legal process without reasonable or probable cause, and nothing of that kind can be alleged in the present case. The text-writers all agree that concurrent writs can be legally issued, and Order XLII., r. 17, of the Rules of the Supreme Court, 1883, expressly provides that a judgment creditor "shall be entitled to sue out one or more writs of fi. fa. to enforce payment of his judgment debt.

Cock, Q.C., and *Rose Innes*, for the sheriff's officers. If Nathan & Co. have been in any way in the wrong, they have done nothing more than make an innocent mistake, and for such a blunder they are not liable to any penalty under s. 29. They only demanded payment of the ordinary fees to which they thought they were entitled, and, as soon as they found they were wrong in asking for poundage, they withdrew the demand for it. They acted bonâ fide, and the "offences" referred to in s. 29 must be of a quasi criminal nature. There must be a mens rea. Sect. 29 does not take away any civil remedy which the judgment debtor may have against the sheriff or his officers by way of an action for money had and received, or otherwise.

The meaning of the schedule to the order as to fees under the Sheriffs Act is not very clear. An execution can hardly be said to be "withdrawn" unless the execution creditor was originally in the wrong, and it is withdrawn without receiving the amount for which the levy is made; an execution can only be "satisfied" by the execution debtor, and it can only be "stopped" by the order of some Court.

It may well be contended that under the circumstances the 2*l.* 7*s.* 6*d.* was rightly demanded. The table of fees annexed to the order of August 31, 1888, deals only with "fees *under this order*;" but rule 15 of Order XLII. shews that other fees may also be charged. It provides that, "in every case of execution, the party entitled to execution may levy the poundage, fees, and expenses of execution, over and above the sum recovered,"

(1) 2 Roll. Rep. 57.

and these items are indorsed on the writ. The sheriff was justified in remaining in possession so long as anything for which he was entitled to levy remained unpaid. The 2*l.* 7*s.* 6*d.* includes 1*l.* 2*s.* 6*d.*, the solicitors' costs of the writ, and for that, at any rate, the sheriff was entitled to levy: *Bayley* v. *Potts* (1). The solicitors' costs are not part of the sheriff's fees. At any rate, the officer remained in possession only a day too long, and for that trespass Denman, J., has given sufficient damages.

Johnston Edwards, in reply. "Offence" does not necessarily mean a criminal or quasi-criminal offence. The word may well have different meanings in sub-s. 1 and in sub-s. 2 of s. 29.

LORD ESHER, M.R. The first point which we have to decide is, whether there was an illegal seizure. A judgment was recovered against the plaintiff. He had property in the City, and also in the county of London, and the judgment creditors issued writs of execution in both places, and delivered the one writ to the sheriff of the City, and the other to the sheriff of the county. They did this concurrently. They did not issue a writ in one county, and then, after the sheriff had seized under that writ in that county, issue another writ in another county, and seize under it before the procedure under the first writ had been completed by sale; but they issued concurrent writs, that is, the two writs were issued at the same time to the two sheriffs. It seems to me beyond question that the issue of the writs concurrently was not illegal. There are dicta to be found in text-books of recognised authority, which were cited by Denman, J., amongst others Tidd's Practice, which state distinctly that you may issue concurrent writs into different counties upon one judgment. Then there is rule 17 of Order XLII. of the Rules of the Supreme Court, 1883, which seems to me to have adopted the old law, and embodied it in a rule. Therefore, on this point, I do not think there can be any doubt. The writs then were issued to the two sheriffs concurrently, and each sheriff seized under the writ which was delivered to him. To suppose that they could do that precisely at the same moment is of course absurd; the seizure under the one writ was probably made before the seizure

(1) 8 A. & E. 272.

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under the other. I do not think it signifies at all how long after the first seizure the second was made. Each sheriff was authorized, and indeed obliged, by the writ which had been issued to him to seize all the goods of the debtor which he should find in his bailiwick, and, if that is so, both seizures were lawfully made by the sheriffs. The person who issued the writs was right in issuing them both; of course he ought not to go on and force sales under the writs recklessly, or when he knew that his debt had been satisfied under one writ. A sheriff has no right to go on to a sale after it has been brought to his notice that the writ has been satisfied; but, until he was informed of that, each sheriff was entitled, and indeed bound, to go on. Therefore, not only were the concurrent writs lawfully issued, but neither of the seizures under them was illegal. Both writs were running at the same time, and both had a right to run until the debt was satisfied, and, when the debt was satisfied, one or both of the writs ought to be withdrawn. But in the issue of the two writs and the seizure under them both, nothing wrong was done by the sheriff, or by the bailiff, or by the execution creditor. The only action, therefore, which would lie against the sheriff or against the execution creditor, would be for using the writ maliciously after it had been properly issued. Any man who uses the process of the law maliciously, and without reasonable and probable cause, so as to injure another, must be liable to an action for damages. But there is no evidence of any malice in the present case, and therefore no action will lie in respect of either the issue of the writs, or the seizure under them. In this respect, therefore, the judgment of Denman, J., was right.

Then comes the question under s. 29 of the Sheriffs Act of 1887, and a more unclear exposition and codification of the law (codification being, I suppose, intended to make the law clear for the benefit of the Queen's subjects) it is hardly possible to imagine. The section is full of difficulties. If you construe it in one way, it seems to me that it would work a cruel injustice; if you construe it in another way, I think it can be brought within the bounds of justice. We must see, therefore, whether it will bear the just interpretation, and the whole question depends upon the construction of this section. It is said that, assuming

the writs to have been lawfully issued, and the seizures lawfully made, yet the sheriff's officers have brought themselves within s. 29,—that they have under some pretext taken or demanded money other than the fees or sums allowed by the Act. No doubt at one moment the sheriff's officers did demand 63*l.* for poundage to which they were not entitled, but they withdrew that demand almost immediately. It has been argued in effect that, if a man demands money in that way and takes it, and then within five minutes afterwards finds that he has made a mistake and returns it, nevertheless he is liable to a penalty of 200*l.* If that were the true construction of the section it would be most unjust. But here the sheriff's officers demanded and actually received a further sum of 2*l.* 7*s.* 6*d.* It was ingeniously argued that they were right in asking for the whole of that 2*l.* 7*s.* 6*d.* I think they were entitled to demand a part of it—1*l.* 2*s.* 6*d.*—but not the whole of it. That depends upon the construction of the Order as to fees made under the Sheriffs Act. The mileage and other fees are certainly within that rule. Then the rule says: "The foregoing fees shall be levied in every case in which an execution is completed by sale, as fees payable to sheriffs were levied before the making of this order. In every case where an execution is withdrawn, satisfied, or stopped, the fees under this order shall be paid by the person issuing the execution." It is said not to be clear when an execution is "withdrawn," as distinguished from "satisfied" or "stopped." That may be so, but I think it is quite clear that what was done in this case must have been one or other of the three, although you may not be able to say precisely which. Under the execution of the sheriff of the county of London, I think one or other of the three things certainly happened, and therefore the fees under this order were no longer payable by the debtor, but were payable by the execution creditor, so that the bailiff did ask for more than he was entitled to. It is said that he did not "demand" it. Looking at the whole case, I should say that he did "demand" it, and he got it. Therefore he demanded money upon the pretext that it was due to him, when it was not due. Therefore he has brought himself within the words of sub-s. (*b*) of sub-s. 2 of the Act. That being so, it is said the officer is liable

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to the penalty of 200*l.* That compels us to consider what is the true meaning of the section. It seems to me that the section deals with two sets of acts which may be wrongly done by the sheriff or his officers. The first set of acts is the more important. They always were offences, they were indictable offences before this Act. This Act is intended to keep up the old law. Sub-s. 1 of s. 29 retains these acts as indictable offences, and says that the person who does them shall be guilty of a misdemeanour. The first thing which strikes me is this: the words are, "If a person being a sheriff, under-sheriff, bailiff, or officer of a sheriff"; several persons are named distinctively, according to the ordinary idiom of the English language; the word "or" must be implied in each case, and the sentence must be read as if it were "If a person being a sheriff, or being an under-sheriff, or being a bailiff, or being an officer of a sheriff." If any one of these persons thus enumerated distributively does those things, he shall be guilty of a misdemeanour. The meaning is, that whichever of those persons does the act, he is to be guilty of a misdemeanour, but the other persons who do not do the act are not to be guilty of a misdemeanour. If the sheriff does the act, he is to be guilty of a misdemeanour; if the under-sheriff does it, he is to be guilty of a misdemeanour, but the sheriff is not. If the bailiff does it, he is to be guilty of a misdemeanour, but the sheriff is not. Each person is to be answerable for the misdemeanour of which he himself has been guilty, but no one else is to be answerable for it.

Then we come to the matters dealt with under sub-s. 2. There again the persons mentioned, the sheriff, under-sheriff, bailiff, or officer, are mentioned distributively. Each person, therefore, is to be answerable for what he himself does, but none of them is to be answerable for what the others do. Each is to be answerable only for what he himself does. Then "he and any person procuring the commission of any such offence shall, without prejudice to any other punishment under the provisions of this Act, but subject as hereinafter mentioned, be liable to be punished by the Court as hereinafter mentioned, and to forfeit 200*l.*, and to pay all damages suffered by any person aggrieved." That which is to befall the offender is called

"punishment." Then, by sub-s. 3, the punishment is to be inflicted by "any of the following Courts—that is to say, Her Majesty's High Court of Justice, any Court of assize, oyer and terminer, or gaol delivery" (those are the Courts expressly charged with the duty of trying offenders), "or any judge of any of the said Courts," and it goes on to provide that, "on proof on oath given by the examination of witnesses, or by affidavit, or on interrogatories, of the commission of the alleged offence, and after hearing anything which the alleged offender may urge in his defence," the Court may "punish the offender, or cause proceedings to be taken for his punishment, in like manner as a person guilty of contempt of the said Court may be punished." The offender is not to be punished for contempt, but he is to be punished "in like manner as a person guilty of contempt of the said Court may be punished." He cannot be punished for contempt, because the only Court which can punish for contempt is the Court before which the contempt is committed, or at which the contempt is pointed. One Court cannot punish a man for contempt of another Court. This, therefore, shews that the words only describe the mode in which the offender is to be punished. How is a man punished for contempt of Court? The Court may imprison him or it may fine him. Therefore the words are equivalent to saying, "Cause proceedings to be taken for his punishment by imprisonment or fine." I do not think it is necessary to say that the acts specified are made criminal. The question is, What is the reasonable construction of the Act? It cannot be doubted that it is a penal statute. It ought not, therefore, to be pressed further against those who are hit by it than we are compelled to press it within reason. When, therefore, we see that there is to be a punishment by summary process, it seems to me immaterial whether the act is called a crime or not. It is at any rate an offence in the nature of a crime. And, in order to constitute an offence in the nature of a crime, there must be what is called a mens rea; the thing must be done with a bad mind. The words used are "offence" and "offender," and in Tomlins' Dictionary of Law Terms, 4th ed., I find this definition of "offence": "The term 'offence' is usually" (that is, if there is nothing in the

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context to the contrary) "by itself understood to be a crime not indictable, but punishable summarily or by the forfeiture of a penalty." This is an exact description of the words which are used in s. 29. The act referred to is called an "offence," and it is a crime not indictable, but punishable summarily or by the forfeiture of a penalty. It does not signify whether it is strictly speaking a crime; it is an offence in the nature of a crime, and a man who does a thing of that kind merely unguardedly or accidentally, without any evil mind, cannot be said to have committed an offence. There is another passage in Tomlins which bears upon a part of the argument which was addressed to us upon clause (*b*) of sub-s. 2 of s. 29. It was said that clause (*b*) describes that which was an indictable offence before the Act. But Tomlins says, "If one statute make the doing an act *felonious*, and a subsequent Act make it only *penal*, the latter is considered as a virtual repeal of the former." And he quotes as an authority Hawkins' Pleas of the Crown, vol. i., c. 40, s. 5. If, therefore, this thing was indictable before the Act, if it was done by a sheriff, it is no longer indictable. It is to be dealt with summarily under s. 29. I take it, therefore, that sub-s. 2 has described things which the statute treats as offences, not indictable offences, but offences punishable summarily by imprisonment or by penalty. The penalty is imposed for an offence in the nature of a crime, and in order that any person should be guilty under this sub-section and liable to punishment, either by penalty or by imprisonment, he must have an evil mind with regard to that which he is doing. That being so, the proceeding to recover the penalty is not a civil proceeding in the sense of an action. This section leaves all rights of civil action which existed before the Act against a sheriff, either for his own acts or for the acts of his subordinates, wholly untouched, and, if any one has against a sheriff that which would have been a good cause of action before this statute, that cause of action remains now. But, in order to recover this penalty under s. 29, you must bring yourself strictly within the words of the section, and no person is answerable for the act of another. Each person is answerable for his own acts only. The action would not lie against the sheriff for the act of his bailiff, unless he himself

took part in it or had procured the bailiff to do it. But, if the bailiff has committed one of these offences mentioned in the Act, he is clearly liable to the penalty of 200*l.* The question will probably arise some day whether, if a person be guilty under this section, the Court is bound to impose the whole penalty of 200*l.*, or whether the true meaning is not, that the Court may impose a penalty not exceeding 200*l.* Upon that point I give no opinion now, because it is not before us.

Then arises the question, whether the sheriff's officers in the present case have been brought within the terms of this section, so as to authorize or to oblige the Court to impose a penalty upon them. The evidence, I think, is clear that they did nothing but make a blunder, that they did not intend anything wrong. They had no wrong in their minds, and were, therefore, not guilty of any offence. They were guilty of a mistake or a blunder, but that does not bring them within this section. The judgment, therefore, of Denman, J., was right on this point.

With regard to the cross appeal, I think that the bailiff stayed longer in possession than he ought to have done; he had information which ought to have led him to leave on the evening of May 1. He remained till May 2, and for that period of time he was a trespasser. Bailiffs ought to be very careful indeed not to stay in a man's house any longer than a reasonable time to enable them to go out of it, when once they have received notice that the execution is at an end. For this trespass I think the sheriff's officers were liable, and, in my opinion, Denman, J., has awarded the proper amount of damages, viz., one farthing. I think that the appeal should be dismissed. In what I have said I believe I have followed the reasoning of Collins, J., in *Shoppee* v. *Nathan & Co.* (1)

FRY, L.J. I have arrived at the same conclusions as the Master of the Rolls. It was argued that the seizure of the property of a debtor, without sale or valuation, is a satisfaction of the debt, to the extent of the amount which the property ultimately produces. It seems to me that that proposition is almost on the face of it untenable. How property can be a

(1) [1892] 1 Q. B. 245.

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satisfaction of a debt at a time when the value of the property is not ascertained, but is to be ascertained at a subsequent time, is extremely difficult for me to understand. And the proposition involves still greater difficulties, for it is obvious that, if the seizure of property is a satisfaction of the debt, the sheriff can go no further, and therefore he can never realize, he can never sell, and the satisfaction would be for an amount which could never be ascertained. The proposition is, therefore, absolutely absurd as a working proposition for the business of life. And there is really no foundation for it in the authorities. The only rag of authority for it has been found in cases in which the expression "satisfaction" has been used, perhaps incautiously, when it was immaterial to consider the distinction between the duty of the sheriff in seizing and his duty in selling. I think the proposition is quite untenable.

With regard to s. 29, I confess that I have felt some difficulty during the course of the discussion. I have been anxious lest we should be undoing the design of the legislature in sub-s. 2, because it is obvious that one view of that sub-section is, that the legislature were anxious to keep sheriffs within the exact limits of their duties, to compel them to be careful and intelligent in the performance of their duties, and to make a want of that care in itself an offence. Some of the acts of sheriffs concern the liberty of the subject, and they have often to deal with people who will naturally suppose that they, being officers of the law, are in what they do acting according to law. It is impossible not to see that this is one view which s. 29 presents to the mind. But, upon the whole, the difficulties in the way of holding that every act which comes within the very words of the section, if it be an innocent mistake, done without either a criminal mind or that negligence which is itself criminal, are so great, that I feel myself compelled to come to the conclusion which has been already expressed by the Master of the Rolls, and to hold that a mere innocent mistake can never make the person who commits it an "offender" within the meaning of sub-s. 2 of s. 29. The acts spoken of are not, as in the preceding sub-section, defined as in themselves constituting a crime. In sub-s. 1 certain acts are mentioned, and it is said that any person who commits them "shall

be guilty of a misdemeanour." But in sub-s. 2 the persons who do certain acts are not declared to be guilty of an offence, but are spoken of as persons who have committed an offence. The legislature considered that persons who do these things fall within the natural description of "offenders." They are not made offenders, but are treated as being offenders, according to the natural meaning of the word in the English language. Therefore, I think the legislature must be dealing with a case in which there is a criminal mind or some criminal negligence. Then, not only is the act spoken of as an "offence," but the person who commits it is spoken of as an "offender"; he is spoken of as being "guilty," and he is made subject to "punishment." All those words seem to me inapplicable to the doing of an act by that kind of innocent mistake which is inherent to the human mind in human business, or negligence of that venial kind which is not criminal. I cannot bring myself to think that the very heavy penalty and the very heavy punishment which the Court is authorized to inflict could have been intended to be inflicted on a person who acts without criminal mind and without criminal laches, and I think that the section must be so read. In my opinion the sheriff's officers, in the present case, in making a demand of £2 7*s.* 6*d.*, which, to the extent of £1 5*s.*, was in excess of their rights, did so by a mere innocent mistake, and they cannot be treated as "offenders" within the meaning of s. 29 (2).

I desire to make one other observation. In his judgment in this case Denman, J., adopted the view which had been expressed by Cave, J., in a case of *Trustees of Woolford's Estate* v. *Levy* (1), to the effect that the demanding of money mentioned in clause (*b*) of sub-s. 2 of s. 29, refers only to a demand by the sheriff as a condition of doing the work. In that view I hesitate to concur. I can conceive that a demand of this sort might be made, after the work had been done, with either criminal negligence or a criminal mind. In such a case I think there would be an "offence" under s. 29, although the demand might not be made as a condition precedent. The Master of the Rolls desires me to say that he entirely agrees with this view, and would state it even more strongly than I have done. He desires to express his opinion

(1) [1892] 1 Q. B. 776.

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that a person who demands or takes money unlawfully — criminally, within the meaning of the language as we have already explained it—would be guilty of an "offence," although he did not make the demand as a condition of doing his work.

LOPES, L.J. The full title of this Act is, "An Act to consolidate the law relating to the office of sheriff in England, and to repeal certain enactments relating to sheriffs which have ceased to be in force or have become unnecessary." It is not an Act to consolidate and amend the law, but merely an Act to consolidate it. It has never been my lot to have to construe an Act more difficult to interpret than this. It was said in the first place, that the defendants acted illegally in issuing concurrent writs, and that concurrent writs could not lawfully be sued out. In the course of the argument it was admitted that this objection could not prevail. In Tidd's Practice, which has always had great weight as an authority, it is said (9th ed. p. 995), "A party may have several writs of the same sort running at the same time, in order to take the defendant, or his goods, &c., in different counties." But it was argued that, even if concurrent writs may be sued out, still several seizures under the concurrent writs are illegal. In my opinion there is nothing wrong in sheriffs seizing under several concurrent writs. In fact, directly a writ of fi. fa. is placed in the hands of a sheriff, he is bound to proceed to execute it by seizing under it. If he did not he would render himself liable to serious consequences. It is true that he cannot proceed to sell under one writ after the debt has been satisfied under another. If he did, he would in all probability render himself liable to an action by the execution debtor, and it might be said that he was maliciously and improperly putting the law in motion under the second, when he knew that the debt had been satisfied under the first writ. That is the only mode in which his action in the matter could be called in question. It was argued for the plaintiff (I cannot say that I understood the argument), that seizure under a writ of fi. fa. is a satisfaction of the debt. I do not see how that can possibly be the case, considering that, when the writ is placed in the hands of the sheriff, although the

special property in the goods passes to him, the general property remains in the execution debtor until sale. When the sale takes place, then the sheriff has authority to hand over the property in the goods to the purchaser at that sale.

Now I come to the important point in the case, viz., the construction of s. 29. The view which I take of it I have arrived at after long and anxious consideration, because the point has been before us in another case in which we intend to give judgment in a few days. (1) My view of s. 29 is, that it deals, and was intended to deal, with the acts of sheriffs and sheriffs' officers done criminaliter, not civiliter. It deals with occasions on which sheriffs or their officers act with a wrong motive—a mens rea—as distinguished from acts done by them civiliter, leaving, be it remembered, every remedy against the sheriff or his officer civiliter just as it existed before the passing of the Act. Sect. 29 deals, by sub-s. 1, with indictable misdemeanours, and, by sub-s. 2, with offences less than misdemeanours, and meriting a lighter punishment — offences punishable summarily — but, in cases arising under both sub-sections, making the individual who actually commits the misdemeanour or offence punishable, whether it be the sheriff, under-sheriff, bailiff, or any officer of the sheriff. This construction is in accordance with the spirit and principle of English law, viz. that no one can be made answerable for the criminal mind of another of which he has no knowledge. Test it in this way. Suppose, under a writ of fi. fa., a sheriff's officer has innocently and by mere mistake, seized the goods of a third party; would it not be monstrous if in such a case an action might be brought against the sheriff himself, and the sheriff be mulcted in a penalty of 200*l.*, when his officer, without his knowledge, by pure accident, as happens almost every day, had seized by mistake the goods of a third party, which he had found in the house of the person whose goods he was authorized under the fi. fa. to seize. It must, I think, be admitted that that would be monstrous. Would it not be equally monstrous if, in the circumstances I have supposed, even the person who had done the act innocently by pure mistake should be subject to a similar punishment, and a similar penalty?

(1) See next case.

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LOPES, L.J.

In the present case it is said that the sheriff's officers have, within the meaning of clause (*b*) of sub-s. 2, "taken or demanded money or reward under some pretext other than the fees or sums allowed by or in pursuance of this or any other Act." In order to make out such a case against these defendants it must be shewn that they acted from a wrong motive, that they had a mens rea. The learned judge has found that there was a mere blunder, and I entirely agree with him. In these circumstances the case against the sheriff's officers under sub-s. 2, clause (*b*), entirely fails.

With regard to the cross-appeal, I agree with the other members of the Court that the bailiff stayed in possession longer than he ought, and I think that the decision of the learned judge on that point was correct, both as to the damages and the costs. I think he was quite right to give the costs as he has done.

I desire to add that I am unable to agree with Cave, J., that, in order to bring a case within sub-s. 2, clause (*b*), it must be shewn that the demanding or taking of money other than the fees allowed was made a condition of the officer doing his duty. I think that view is erroneous. In my opinion both appeals fail, and the decision of the learned judge must stand.

Appeals dismissed.

Solicitors for plaintiff: *Bramall & White.*

Solicitors for execution creditors: *Hollams, Son, Coward, & Hawksley.*

Solicitor for sheriff's officers: *W. Burchell.*

W. L. C.

[IN THE COURT OF APPEAL.]

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Feb. 24;
April 12.

BAGGE *v.* WHITEHEAD.

Sheriff—Wrongful Act of Bailiff—Liability of Sheriff to Penalty—Sheriffs Act, 1887 (50 & 51 *Vict. c.* 55), *s.* 29, *sub-s.* 2.

By s. 29, sub-s. 2, of the Sheriffs Act, 1887: "If any person being either a sheriff, under-sheriff, bailiff, or officer of a sheriff . . . . is guilty of any offence against or breach of any of the provisions of this Act, or of any wrongful act or neglect or default in the execution of his office, or of any contempt of any superior Court, he shall . . . . be liable—(i.) to be punished by the Court as hereinafter mentioned, and (ii.) to forfeit two hundred pounds, and to pay all damages suffered by any person aggrieved."

An execution debtor brought an action against a sheriff under the above section to recover a penalty of 200*l.* on the ground that the sheriff's bailiff in executing a writ of fi. fa. had not excepted from seizure wearing apparel, bedding, tools, and implements of trade to the value of 5*l.*, as required by 8 & 9 Vict. c. 127, s. 8:—

Held, that the liability to a penalty was imposed by the section only upon the person actually guilty of the wrongful act, and that the sheriff was, therefore, not liable.

APPEAL of the plaintiff from the judgment of Wills, J., at the trial without a jury.

The action was brought against the sheriff of London under s. 29, sub-s. 2, of the Sheriffs Act, 1887 (1), to recover a penalty of 200*l.* for an alleged breach of his duty as sheriff, the breach of duty relied on being that his bailiff, in executing a writ of fi. fa. under a judgment obtained against the plaintiff, had not left apparel, bedding, tools, and implements of trade to the value of

(1) By 50 & 51 Vict. c. 55 (the Sheriffs Act, 1887), s. 29, sub-s. 2: "If any person being either a sheriff, under-sheriff, bailiff, or officer of a sheriff . . . . does any of the following things—that is to say . . . . (*d*) is guilty of any offence against or breach of the provisions of this Act, or of any wrongful act or neglect or default in the execution of his office or of any contempt of any superior Court, he and any person procuring the commission of such offence shall, without prejudice to any other punishment under the provisions of this Act, but subject as hereinafter mentioned, be liable—(i.) to be punished by the Court as hereinafter mentioned; and (ii.) to forfeit two hundred pounds, and to pay all damages suffered by any person aggrieved, and such forfeiture and damages may be recovered by such person as a debt by an action in Her Majesty's High Court of Justice."

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5*l.*, as required by 8 & 9 Vict. c. 127, s. 8. The defendant paid a sum of 10*l.* into Court, with an alternative defence denying liability. The learned judge found as a fact that the bailiff had not excepted the required amount of property from seizure; but held that under s. 29 of the Sheriffs Act, 1887, the sheriff was not liable to a penalty for the wrongful act of his bailiff, the person guilty of the misconduct being the only person liable to a penalty under the section; he, however, awarded the plaintiff 5*l.* general damages at common law. The plaintiff appealed.

Feb. 24. *Ambrose, Q.C.*, and *Cavanagh*, for the plaintiff. The liability to the penalty attaches to the sheriff, though there may have been no personal misconduct on his part. Where the misconduct of the officer has been wilful, and amounts to a contempt of Court, proceedings must be taken against the officer himself, the mode of procedure being laid down in s. 29, sub-s. 3, for the officer is not the sheriff's agent to commit a criminal offence or a contempt of Court; in other cases an action to recover the penalty may be brought either against the officer or the sheriff. The liability under the section is not restricted by the word "he" to the actual offender, for by s. 1 of the Interpretation Act, 1889, words used in the singular number include the plural.

[FRY, L.J. The language of sub-s. 2 shews plainly that the liability to a penalty is only cumulative upon punishment by the Court; it is not a mere civil remedy.]

[They cited *Woodgate* v. *Knatchbull* (1); *Peshall* v. *Layton* (2); *Lee* v. *Dangar* (3); *Shoppee* v. *Nathan.* (4)]

Cock, Q.C. (*Rose Innes*, with him), for the defendant. The section deals only with the person actually guilty of the offence charged, who alone is liable to the punishment and the penalty; it provides for the punishment of the actual offender, leaving the common law rights against the sheriff the same as before. The penalty of 200*l.* is part of the punishment of the actual offender; it is part of the remedy given to the person damnified against the person who has caused the loss.

Ambrose, in reply.

Cur. adv. vult.

(1) 2 T. R. 148.
(2) 2 T. R. 712.
(3) [1892] 1 Q. B. 231.
(4) [1892] 1 Q. B. 245.

April 12. LORD ESHER, M.R. This action is brought against a sheriff to recover a penalty of 200*l.*, on the ground that his bailiff seized the whole of the plaintiff's property, and did not leave wearing apparel, bedding, and implements of trade to the value of 5*l.* That the sheriff is liable to an action of damages for the wrongful act of his bailiff cannot be doubted, and the only question is whether he is liable to the penalty of 200*l.* This is really determined by our recent decision on appeal in *Lee* v. *Dangar* (1), as to the construction of s. 29 of the Sheriffs Act, 1887; we there decided that each person named in the section was, so far as the penalty is concerned, liable only for acts done by himself, and not for the acts of the others. This appeal must, therefore, be dismissed.

FRY, L.J. I am of the same opinion.

LOPES, L.J. I have nothing to add to what I have already said in *Lee* v. *Dangar*. (1) Acts done criminaliter are alone dealt with in s. 29, not acts done civiliter, in respect of which the remedy against the sheriff remains the same as before the Act. I agree, therefore, that the plaintiff's claim in respect of the penalty is not maintainable.

Appeal dismissed.

Solicitor for plaintiff: *S. B. Somerville.*
Solicitor for defendant: *W. Burchell.*

(1) Ante, p. 337.

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Feb. 20;
March 29, 30, 31;
April 1;
May 7.

[IN THE COURT OF APPEAL.]

COMPANHIA DE MOCAMBIQUE *v.* BRITISH SOUTH AFRICA COMPANY.
DE SOUSA *v.* SAME.

Jurisdiction—Trespass—Land in Foreign Country—Defendant within Jurisdiction — Declaration of Title to Land in Foreign Country — Plea to Jurisdiction.

Local venue having been abolished by the Judicature Rules, the High Court has jurisdiction to entertain an action for damages in respect of trespass to land situate in a foreign country against a defendant who is within the jurisdiction.

So *held*, by Fry and Lopes, L.JJ., Lord Esher, M.R., dissenting.

Held, by the Queen's Bench Division (Lawrance and Wright, JJ.), first, that the High Court will not entertain an action for directly determining the title to land in a foreign country.

Secondly, that a plea to the jurisdiction need not allege the existence of a competent Court abroad, when the ground of the plea is a want of jurisdiction in the Courts of this country generally.

Points of law raised by the pleadings, and set down for trial by order of a judge, under Order xxv., r. 2.

The substance of the pleadings is sufficiently stated in the judgments of the Divisional Court and of the Court of Appeal. By their statement of claim the plaintiffs alleged that they were possessed of lands, mines, and mining rights, and that the defendants committed trespasses upon the plaintiffs' lands and goods, and assaulted their servants. By the 16th paragraph the plaintiffs alleged that the wrongs before mentioned were done maliciously; par. 17 charged a malicious disturbance by the defendants of the plaintiffs' rights. The plaintiffs claimed a declaration of title to the lands in question, an injunction, and damages.

The defence alleged that the lands in question were in South Africa, out of the jurisdiction of the High Court, and that the 16th and 17th paragraphs of the statement of claim disclosed no cause of action. The alleged assault upon the plaintiffs and trespasses on their goods were justified by the defendants as having been done in defence of the rights vested in them under a grant from a native chief.

The plaintiffs, by their reply, objected to the defence as being insufficient in law.

The questions of law raised by the pleadings were, by an order of Collins, J., set down for hearing before a Divisional Court.

Sir Henry James, Q.C., Bompas, Q.C., and *T. Willes Chitty,* for the plaintiffs in both actions.

Sir Charles Russell, Q.C., Cohen, Q.C., Hollams, and *Lord Robert Cecil,* for the defendants.

Cur. adv. vult.

Feb. 20. The judgment of the Court (Lawrance and Wright, JJ.) was delivered as follows by

WRIGHT, J. These actions are brought in substance for the purpose of trying the right of the British South Africa Company to territories in South Africa which they have occupied, but which are alleged by the plaintiffs to be under the sovereignty of Portugal, and to belong to the plaintiffs as Portuguese subjects by virtue of grants or concessions from the State of Portugal and from the native chiefs. By their statement of claim the Mocambique Company allege their possession of the territories and their title under those grants and concessions, and allege that the defendants have committed trespasses to the plaintiffs' lands and goods, and evicted the plaintiffs and assaulted their servants. By the 16th paragraph they further allege that all these wrongs were done maliciously. By the 17th paragraph they allege, in substance, as a separate personal cause of action, a malicious disturbance of the plaintiffs' rights, and malicious procurement by the defendants by wrongful means of breaches of contracts, made by the plaintiffs with the plaintiffs' servants and tenants, and with the native chiefs. They claim a declaration of title to the territories in question, and injunctions and damages. By way of defence the British South Africa Company deny the jurisdiction of this Court to determine title to the foreign land, and say that the 16th and 17th paragraphs of the claim disclose no cause of action, and, as to the alleged wrongs to persons and goods, they justify the acts complained of as having been done in defence of their own rights to the lands under grants from a native sovereign chief. The sufficiency of these grounds of defence in point of law is now raised, as if upon demurrer, upon the assumption that the facts alleged in

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the pleadings respectively challenged are true. The first and most important question is, whether the Court can entertain the action in so far as the claim is for a declaration of title to foreign land. There is no doubt that before the Judicature Acts the Courts of this country uniformly refused to entertain actions brought for the purpose of directly determining title to foreign land. The doubt is, whether the ground of refusal was want of general jurisdiction, or whether it was an objection which depended on the doctrine of local venues, and may have disappeared as a consequence of their abolition. To determine this it appears necessary to refer in some detail to the authorities, and to consider the grounds of them; and it will be convenient so far to anticipate another part of the case as to include in the same review the authorities with respect to the power of the Courts here to entertain actions for damages for trespass to foreign land. The earliest important case which throws any light on these questions in relation to the Courts of Common Law appears to be *Skinner* v. *East India Company* (1), in 1667. There Skinner presented a petition to the King in Council, complaining that the East India Company had assaulted him and taken his ship and goods, and dispossessed him of land in the Indies, and of an island called Barella, and praying the King to appoint a Court of the Constable and Marshal, "to hear and determine those matters, they not being otherwise determinable by the ordinary course of law, or to put it into any other way for just relief." The King referred the case to the House of Peers, "to do the petitioner justice according to the merits of his cause." The House ordered the company to bring in an answer, and the company put in a plea to the jurisdiction of the House, denying its possession of original jurisdiction in matters outside the privilege of Parliament. The plea did not allege that there was any other competent Court. It was overruled by the House, and after long delay the company pleaded again as before, with the addition that "the matters of complaint are such for which remedy is ordinarily given in the Courts of Westminster Hall, wherein these respondents have right to be tried, and ought not to be brought to the House of Peers per saltum." The Lords

(1) 6 State Trials, 710.

referred the petition and answer to all the judges to report "whether the petitioner were relievable in law or equity, and, if so, in what manner." The judges reported "that the matters touching the taking away of the petitioner's ship and goods and assaulting of his person, notwithstanding the same were done beyond the seas, might be determined upon [by] His Majesty's ordinary Courts at Westminster; and, as to the dispossessing him of his house and island, that he was not relievable in any ordinary Court of Law." The Lords ultimately proceeded with the case, and ordered the company to pay to Skinner 5000*l.* "for his losses and damages sustained." The further proceedings, which after a long conflict between the two Houses of Parliament resulted in the abandonment by the House of Lords of its claim to exercise original jurisdiction, and the expunction of all record of the case both from the journals of the House and from the Council books, are matter of constitutional history. The only part of them which throws any light on the law as then understood is the protest of the company addressed to the House of Commons, in which it is set forth that all the matters complained of by Skinner, except what concerned the island, "are matters clearly determinable in His Majesty's ordinary Courts of Law, as by the judges attending their Lordships hath been resolved and reported; and for the island, the same is parcel of the dominions of a foreign prince, and so the right thereof only determinable by the laws of that prince." In 1725, in *Shelling* v. *Farmer* (1), the plaintiff sued for trespass to his person and house in the East Indies, "to wit in London." Eyre, C.J., rejected evidence as to the house. In 1760, in *Robinson* v. *Bland* (2), Lord Mansfield said: "A conveyance or will of land, a mortgage, a contract concerning stocks, must be all sued upon in England; and the local nature of the thing requires them to be carried into execution according to the law here." In 1774, in *Mostyn* v. *Fabrigas* (3), Lord Mansfield said: "There is a formal and a substantial distinction as to the locality of trials. I state them as different things; the substantial distinction is where the proceeding is in rem, and where the effect of the judgment cannot be had if it is laid in a wrong place. That

(1) 1 Str. 646.
(2) 2 Burr. 1077, at p. 1079.
(3) 1 Cowp. 161, at p. 176.

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is the case of all ejectments where possession is to be delivered by the sheriff of the county; and as trials in England are in particular counties the officers are county officers; therefore the judgment could not have effect if the action was not laid in the proper county. With regard to matters that arise out of the realm, there is a substantial distinction of locality too; for there are some cases that arise out of the realm which ought not to be tried anywhere but in the country where they arise. . . . If an action were brought relative to an estate in a foreign country, where the question was a matter of title only and not of damages, there might be a solid distinction of locality." He proceeds to point out that in transitory actions the venue was merely matter of form and procedure, and did not prevent actions being tried in this country for assaults abroad; and then come (1) the expressions upon which the plaintiffs in the present case mainly relied: "I have had some actions before me rather going further than these transitory actions—that is, going to cases which in England would be local actions. I remember one—I think it was an action brought against Captain Gambier, who, by order of Admiral Boscawen, had pulled down the houses of some suttlers. . . . The objection was taken to the count for pulling down the houses; and the case of *Skinner* v. *East India Co.* (2) was cited in support of the objection. On the other side they produced from a manuscript note a case before Eyre, C.J., where he overruled the objection" (quære, a misreport of *Shelling* v. *Farmer* (3)), "and I overruled the objection upon this principle—namely, that the reparation here was personal and for damages, and that otherwise there would be a failure of justice, for it was upon the coast of Nova Scotia, where there were no regular Courts of Judicature; but, if there had been, Captain Gambier might never go there again, and therefore the reason of locality in such an action in England did not hold." He proceeds to mention another similar case heard by himself, and another before Lord Hardwicke. On the opinions so expressed it is to be observed, that they were not necessary for the decision in *Mostyn* v. *Fabrigas* (4), that they have never been followed, and that, although they may

(1) 1 Cowp. 161, at pp. 180, 181.
(2) 6 State Trials, 710.
(3) 1 Str. 646.
(4) 1 Cowp. 161.

well be right where, as in the cases referred to by Lord Mansfield, no question of title is raised, they do not appear to have any necessary application to a case like the present one, in which the question of the title to the foreign land is directly raised. In 1776, in *Rafael* v. *Verelst* (1), De Grey, C.J., said, as to the place where the imprisonment happened—viz., the dominions of a foreign prince: "Crimes are in their nature local, and the jurisdiction of crimes is local. And so as to the rights of real property, the subject being fixed and immoveable. But personal injuries are of a transitory nature, and sequuntur forum rei." In 1792, in *Doulson* v. *Matthews* (2), the plaintiff claimed damages for trespass to a house in Canada. It was contended, on the authority of *Mostyn* v. *Fabrigas* (3), that the action, being merely a personal action for damages, was transitory; but Lord Kenyon and Buller, J., held that as a matter of settled practice actions of trespass to land were local. In 1867, in *The Mayor and Corporation of London* v. *Cox* (4), Willes, J., in delivering the opinion of the judges, said (5): "If an action of trespass to land abroad were brought in the Queen's Bench, the defendant need not plead a dilatory plea . . . . but, if the foreign locality appeared upon the count, he might demur, and if it did not appear he might plead in chief or bar a denial of the trespass (which would be assumed as alleged within the jurisdiction), and at the trial the plaintiff would be nonsuited or lose the verdict." In 1870, in *Phillips* v. *Eyre* (6), the same judge said: "There are restrictions in respect of locality which exclude some foreign causes of action altogether—namely, those which would be local if they arose in England." In 1876, in *The M. Moxham* (7), James, L.J., said: "Very grave difficulties indeed might have arisen as to the jurisdiction of this Court to entertain any action or proceedings whatever with respect to injury done to foreign soil." It seems plain that, in the view of most of the judges whose language has been cited, there was a fundamental want of jurisdiction in the Common Law Courts of this country to determine directly questions of title to foreign land—a want not dependent merely on

(1) 2 Wm. Bl. 983, at p. 1055.
(2) 4 T. R. 503.
(3) 1 Cowp. 161.
(4) Law Rep. 2 H. L. 239.
(5) Law Rep. 2 H. L. 239, at p. 261.
(6) Law Rep. 6 Q. B. 1.
(7) 1 P. D. 107.

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the law of venue, nor dependent even on the defect of power to enforce a judgment in another country. Courts of Equity have, from the time of Lord Hardwicke's decision in *Penn* v. *Lord Baltimore* (1), in 1750, exercised jurisdiction in personam in relation to foreign land against persons locally within the jurisdiction of the English Court in cases of contract, fraud, and trust, enforcing their jurisdiction by writs of ne exeat regno during the hearing, and by sequestration, commitment, or other personal process after decree. But, although entirely emancipated from the difficulties of venue, and although armed with much more effectual powers of enforcing their decrees than were possessed by the Courts of Common Law, the Courts of Equity refused, with almost equal uniformity, the direct determination of title to foreign land. In 1751, in *Bishop of Sodor and Man* v. *Earl of Derby* (2), Lord Hardwicke said, correcting an opinion expressed at a former hearing, that the Courts of this country have no general jurisdiction to try and determine title to the Isle of Man or any feudatory dominion. In *Penn* v. *Lord Baltimore* (1), Lord Hardwicke entertained a bill for settling boundaries and otherwise compelling performance of an agreement relating to lands in Pennsylvania; but he did so expressly on the ground that the agreement was an English one, and that performance could be enforced in personam. He refused an order that the successful party should quietly hold the lands in question. In 1763, in *Pike* v. *Hoare* (3), Lord Northington refused an issue to try the validity of a will of lands in Pennsylvania, and he said: "A will of lands in any of the colonies is not triable in Westminster Hall. If it were, it would be introductive of great confusion, and be very detrimental to the colonies. We have colonies and factories in the four quarters of the world, and each colony and factory has distinct laws of its own. Judges in Westminster Hall are not acquainted with the laws of the several colonies and factories; they are local." In 1841, in *Tulloch* v. *Hartley* (4), indeed, Shadwell, V.C., allowed a bill for payment of legacies, &c., out of the lands of a testatrix in Jamaica, and for declaring a certain estate to have been hers,

(1) 1 Ves. Sen. 444.
(2) 2 Ves. Sen. 337.
(3) 2 Eden. 182.
(4) 1 Y. & C. Ch. 114.

and for settlement of boundaries by commissions to be appointed by the English Court; but he seems to have gone beyond any other decided case, even as against executors. In 1861, in *Norris* v. *Chambres* (1), Lord Romilly expressed the opinion that the doctrine of *Penn* v. *Lord Baltimore* (2) had been carried far enough, and he refused, even as between parties domiciled in this country, to declare a lien on foreign lands for purchase-money advanced by the plaintiff as against the defendant, to whom the land had been again wrongfully sold. In 1862, in *Holmes* v. *The Queen* (3), relief by way of restoration was sought against the Crown, as the alleged trustee of lands in Canada for purposes said to be designated by colonial statutes. It was not suggested that, apart from the supposed trusteeship, the Court had any direct jurisdiction over lands in Canada; but it was argued that the Queen is to be regarded as present in person in all parts of her dominions, and that, on that ground, relief could be given against her in personam according to the principle of *Penn* v. *Lord Baltimore*. (2) Wood, V.C., allowed a demurrer, saying: "It is impossible to say that the legislature of Canada can in truth have the land withdrawn from the jurisdiction of their province, and brought within the jurisdiction of this Court, simply upon the technical ground that Her Majesty is present in this country." In 1863, in *Cookney* v. *Anderson* (4) the question was as to foreign lands, and Lord Westbury said that the Courts of civil jurisdiction in every country sit to administer the municipal law of that country, and their jurisdiction, therefore, is limited and territorial, and that all questions relating to the ownership of land must be determined by the lex loci rei sitæ, meaning, apparently, that it must be determined by the tribunals of the same country. In 1876, in *Reiner* v. *Marquis of Salisbury* (5), Malins, V.C., said: "You cannot, in my opinion, maintain a suit in this country for the recovery of lands in the colonies or a foreign country." In 1883, in *In re Hawthorne* (6), Kay, J., refused to entertain an

(1) 30 L. J. (Ch.) 285.
(2) 1 Ves. Sen. 444.
(3) 31 L. J. (Ch.) 58.
(4) 1 D. J. & S. 365; 32 L. J. (Ch.) 305, 427.
(5) 2 Ch. D. 378, at p. 385.
(6) 23 Ch. D. 743.

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action for an account of the proceeds of sale of a house in Saxony, where the title depended upon the law of Saxony, saying that he was not aware of any case in which "a contested claim depending upon the title to immoveables in a foreign country, strictly so-called . . . . has been allowed to be litigated in this country simply because the plaintiff and defendant happen to be here. . . . . Courts here sit to determine the municipal law of the country, and have no authority to determine such a case as this, whether or not the plaintiff's claim is well founded." The proper conclusion appears to be that, speaking generally, and subject to qualifications depending on personal obligations, it is a general principle of jurisdiction, that title to land is to be directly determined, not merely according to the laws of the country where the land is situate, but by the Courts of that country, and this conclusion is in accordance with the rule ordinarily adopted by the jurisprudence of other countries. (See Story's Conflict of Laws, sects. 551–5.) It does not in any way involve a denial of jurisdiction to give relief in personam, or against property in this country, in any case where title to the foreign land is not directly involved, or can be proved as a fact by the judgment of a competent Court in the foreign country. It follows that this Court cannot entertain the action of the Mocambique Company, in so far as it claims a declaration of title to the lands in dispute, unless, indeed, the Court is to assume jurisdiction on the ground suggested by Lord Mansfield in *Mostyn* v. *Fabrigas* (1) as a possible ground for entertaining an action for damages for trespass to land—namely, that there are no regular Courts to which the plaintiffs could resort in the country where the land is situated. As to this, it is to be observed, that Lord Mansfield himself appears to negative the application of this doctrine to questions of title, and it is inconsistent with the opinions of the judges in *Skinner's Case* (2), and in *Rafael* v. *Verelst.* (3) Nor, even if the doctrine is sound, can it well be invoked by the plaintiffs in this case, for they are Portuguese subjects, and they allege the country in question to be Portuguese, and it must be assumed that they have a remedy

(1) 1 Cowp. 161. (2) 6 State Trials, 710.
(3) 2 Wm. Bl. 983, 1055.

by the laws of Portugal. There are, indeed, cases in which the Courts of this country have declined jurisdiction, not for entire want of power to entertain a case, but on the ground that the subject-matter of a suit is entirely in a foreign country and dependent on the laws of that country, and the parties are resident in that country, though temporarily here, and there is a tribunal in that country competent to do justice: see *Doss* v. *Secretary of State for India* (1875) (1); *Matthaei* v. *Galitzen* (1874) (2); *Blake* v. *Blake* (3); *Cookney* v. *Anderson* (1863). (4) In cases of that kind, if the existence of the competent foreign tribunal were negatived, the principal ground for a refusal to exercise jurisdiction would be removed. But the present case is not of that kind.

The second question is, whether the same objection to jurisdiction applies to the claim of the plaintiffs for damages for trespass to the foreign lands. There is much stronger ground for the contention that the admitted inability of the Common Law Courts before the Judicature Acts to entertain such a claim was a mere consequence of the law of venue, and to this effect is the judgment of Marshall, C.J., in *Livingston* v. *Jefferson* (5), cited by Bramwell, L.J., in *Whitaker* v. *Forbes* (1875). (6) But, supposing this contention to be correct, it does not follow that the abolition of local venues extends the jurisdiction of the Court to actions which it could not formerly have entertained. In *Whitaker* v. *Forbes* (1875) (7) the action was brought in Middlesex for an annuity by way of rent-charge created by an English devise of lands to the defendant, who pleaded to the jurisdiction that the lands were in Australia. It was held on demurrer that, as the liability depended on privity of estate, the action was local and could not be tried in England. All the judges in the Common Pleas and in the Court of Appeal appear to have thought, that the difficulty was, in that particular case, one of venue merely, and not one of jurisdiction, and that, apart from the settled rules of venue, the action ought to have been maintainable in this country, and

(1) Law Rep. 19 Eq. 509.
(2) Law Rep. 18 Eq. 340.
(3) 18 W. R. 944.
(4) 1 D. J. & S. 365.
(5) 1 Brock. Rep. 203.
(6) 1 C. P. D. 51, at p. 53.
(7) Law Rep. 10 C. P. 583; 1 C. P. D. 51.

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Lord Cairns said (1): "The recent legislation provides that for the future there shall be no distinction between local and personal actions as regards venue. It may be that hereafter such an action as this would be maintainable; but it is not necessary to express an opinion on the point." In the present action it is not necessary to decide what would be the effect of the Judicature Acts and Rules in such a case as that of *Whitaker* v. *Forbes* (2), where no question either of title to the land itself or of title to the rent-charge was raised by the plea. Even in such a case, it would seem that there is some presumption against construing rules of procedure to create power in the Court to entertain an action, which for any reason could not have been entertained before by any Court in England. It does not appear to have been the intention of the legislature to do more than to alter procedure in actions which could, before the Judicature Acts, have been maintained in one or other Court in England. (Compare *Lyell* v. *Kennedy* (3); *North London Ry. Co.* v. *Great Northern Ry. Co.* (4); *In re Mills' Estate.* (5)) On the other hand, it might well be held that where, as in *Whitaker* v. *Forbes* (2), the objection to the exercise of jurisdiction depended wholly on matter of mere procedure, however inveterate, the objection ceases when the procedure on which it depended is swept away. But the considerations adverse to the exercise of jurisdiction apply with much greater force to a case like the present action, which is brought for the express purpose of trying the title to the land, and of enforcing by injunction the right to the possession of it. Assuming that an action can be entertained here for damages for trespass to foreign land, where no question of title is raised, it would seem that, when an issue of title is directly raised, either by the statement of claim or by the statement of defence, the Court must be as incompetent to try that issue as it is to try an action directly brought for the recovery of the land, and if, as in the present case, that issue is raised in the first instance, the proper conclusion appears to be that, for this cause of action, the action cannot be entertained at all. The observa-

(1) 1 C. P. D. at p. 52.
(2) Law Rep. 10 C. P. 583; 1 C. P. D. 51.
(3) 20 Ch. D. at p. 491.
(4) 11 Q. B. D. 30.
(5) 34 Ch. D. 33.

tions of Willes, J., in *Mayor, &c., of London* v. *Cox* (1), appear to be directly in point to this effect. It might be otherwise if the statement of claim alleged the existence of a judgment of a competent Court of the country in which the land is situate, deciding the question of title, and if the only questions to be tried were, the fact of trespass by the defendant and the amount of damages. If these distinctions are sound, it becomes apparent that the opinion of Lord Mansfield in *Mostyn* v. *Fabrigas* (2), assuming it to be correct, is not properly applicable to the present case.

The third question is upon an exception taken by the plaintiffs to the form of the defendants' plea to the jurisdiction. It is argued that every plea to jurisdiction must shew a competent Court to which the plaintiff could have resorted. This argument would have been well founded, if the plea had been a technical plea to the jurisdiction—that is, a dilatory plea in the nature of a plea in abatement, admitting a cause of action cognizable by the law of England, but objecting that the plaintiff had come to the wrong one out of the various Courts amongst which the judicial powers of the Crown are parcelled out. It has no application where the objection is to the general jurisdiction of the Crown by any of its Courts, and where the plea is really a plea in bar, on the ground that the matters alleged are such that no Court in this country can take cognizance of them. That objection may be pleaded in bar, or may, without any special plea, be raised by demurrer, or as a defence at the trial under a plea of not guilty or other general issue. In *Skinner's Case* (1667) (3) the plea to the jurisdiction of the House of Lords did not at first suggest any competent Court. In the *Earl of Derby's Case* (1751) (4), Lord Hardwicke overruled a technical plea to the jurisdiction of the Court of Chancery, because it did not shew any other competent Court, but he said that this decision did not deprive the party of his equity, for the same thing might be insisted on in his answer. In *Nabob of Arcot* v. *East India Co.* (1791) (5) the defendants pleaded that the matters complained of

(1) Law Rep. 2 H. L. 239.
(2) 1 Cowp. 161.
(3) 6 State Trials, 710.
(4) 2 Ves. Sen. 337.
(5) 3 Br. Ch. Ca. 292; 4 Br. Ch. Ca. 180; 2 Ves. Jun. 56.

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were acts of state not cognizable in any Court, and Lord Thurlow said that this was not a plea to the jurisdiction at all, but a plea in bar, "Ex tali facto actio non oritur"; and, upon answer put in to the same effect, Eyre, C.B., and the other Lords Commissioners admitted the defence and dismissed the bill. In *Rex* v. *Johnson* (1805) (1), where an Irish judge was indicted for a libel, and the venue was laid at Westminster, and he pleaded to the jurisdiction, alleging that the libel was in Ireland and the proper Courts were those of Ireland, it was held that, as a technical plea to the jurisdiction, the plea was bad, for, the offence being laid in England and admitted by the plea to have been committed in England, a competent Court in England must be shewn; but it was said that the defence would be open as matter of bar, or under a plea of not guilty, and that the plea was in truth an argumentative plea of not guilty. In the *Mayor, &c., of London* v. *Cox* (1867) (2), Willes, J., in delivering the opinion of the judges, points out the distinction between the two senses of a plea to the jurisdiction—the first, the technical dilatory plea, which admits the general jurisdiction of the Court, but states a special exemption of the defendant or a special privilege of place; the second, a plea denying the existence of a cause of action within the local limits of the jurisdiction; and he says (3): "Even in the superior Courts themselves, where the subject-matter is such as to imply a local limit of jurisdiction, the exception is peremptory; there is no necessity for a dilatory plea, nor is the objection waived by pleading in chief. Thus, if an action of trespass to land situate abroad were brought in the Queen's Bench, the defendant need not plead a dilatory plea shewing what Court has jurisdiction; but, if the foreign locality appeared upon the count, he might demur, and if it did not appear he might plead in chief or bar a denial of the trespass (which would be assumed as alleged within the jurisdiction), and at the trial the plaintiff would be nonsuited or lose the verdict; and, whether upon demurrer or plea, the ordinary judgment would be given for the defendant"—citing *Doulson* v. *Matthews*. (4) See to the same effect Beame's Pleas in Equity, p. 55; Mitford on

(1) 6 East, 583.
(2) Law Rep. 2 H. L. 239.
(3) Law Rep. 2 H. L. 239, at p. 261.
(4) 4 T. R. 503.

Pleadings, p. 220; Chitty on Pleading, vol. i. pp. 455–7: "Where the Court has no jurisdiction at common law . . . . such want of jurisdiction may in general be pleaded in bar or given in evidence under the general issue, and is not properly the subject of a plea in abatement." The result on this point, therefore, is that a plea to the jurisdiction in the technical sense would have been inappropriate in this case. The objection to the action is one which could have been taken by demurrer to the statement of claim, or can be pleaded as it is pleaded, or could be taken at the trial as a ground for non-suiting, and the plaintiffs' objection to the plea must be overruled.

The fourth question is, whether the 16th and 17th paragraphs of the statement of claim state any cause of action cognizable by this Court. The 16th, in substance, merely alleges that the trespasses before complained of were done maliciously with intent to injure the plaintiffs. No doubt the object of the pleader was to avoid the difficulty which has been discussed as to the locality of actions for trespass to land; but it does not seem that the difficulty can be so avoided. This paragraph must be read exactly as if it repeated the earlier paragraphs, alleging title to the foreign land and an eviction of the plaintiffs from it, with the addition that the eviction was malicious. But such an addition appears to be immaterial. If the eviction was otherwise rightful, malice cannot make it wrongful. If it was otherwise wrongful, malice could be material only, if at all, to the amount of damages. And, if the Court cannot try the title or the rightfulness of the eviction, the mere averment of malice does not raise any question which can be tried at all. So far, however, as this paragraph refers to trespasses to the person, or to trespass to or conversion of goods, the case is different, and the action can be entertained and tried irrespectively of the immaterial averment of malice, subject to the difficulty that, if and when it appears at the trial that title to the foreign land has to be determined, the party who requires to prove that title may be unable to make out his case, and subject also to the further difficulty which arises more clearly upon the 17th paragraph.

The 17th paragraph, in substance, alleges a malicious dis-

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turbance of the plaintiffs' rights, and malicious procurement by the defendants by wrongful means of breaches of contracts made by the plaintiffs with their servants and tenants and with the native chiefs, and the matters alleged, if they had occurred in this country, would probably be held to include one or more causes of action. Nor does this paragraph appear open to objection in point of form, on the ground that it does not expressly aver that the acts complained of were unlawful according to the local law of the country in which they were done. Such an averment appears not to have been made in the declaration in any of the cases in which actions have been entertained in this country for wrongs alleged to have been committed abroad. Possibly, also, the want of this averment, if necessary, is supplied by the reply. When, indeed, the case comes to be tried, it will be necessary for the plaintiff to satisfy the Court in some manner as to every cause of action on which he relies, that the acts complained of were in some sense unlawful in the country where they were done, as well as in some sense unlawful by the laws of this country. Possibly, as regards such wrongs as an actual assault and battery, or the taking of goods by force from the owner, the wrongfulness according to local law would be assumed. As Crompton, J., said in *Scott* v. *Lord Seymour* (1), "we can hardly suppose that there could be any such barbarous law," as that damages could not be recovered by the law of Naples for an assault. Possibly, also, even if it were proved that the assault or taking were committed in a country so barbarous that such acts were not there regarded as wrongful at all, it might be held that, in the absence of local law, every subject of a civilized state carried with him a right to protection against such aggressions as every civilized state necessarily regards as wrongful. (*Cf.* the observations of Sir W. Scott in the case of *The Indian Chief.* (2)) But these doctrines can hardly apply to causes of action of such a kind as those suggested in the 17th paragraph. It cannot be assumed that they are in any sense unlawful in Manica land, and if this is not proved the plaintiffs must fail to recover under this paragraph. In *Scott* v.

(1) 1 H. & C. 219; 31 L. J. (Ex.) 457; 32 L. J. (Ex.) 61.
(2) 3 Chr. Rob. at p. 29.

Lord Seymour (1), the effect of the plea was (as Pollock, C.B., pointed out) to admit that the assault was at least wrongful by the law of Naples. In *Phillips* v. *Eyre* (1870) (2), Willes, J., said: "Civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law. . . . . As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. . . . . Secondly, the act must not have been justifiable by the law of the place where it was done." In *The M. Moxham* (1876) (3), Mellish, L.J., said: "No action can be maintained in the Courts of this country on account of a wrongful act, either to a person or to personal property, committed within the jurisdiction of a foreign country, unless the act is wrongful by the law of the country where it is committed, and also wrongful by the law of this country." If the plaintiffs prove that the law of Portugal is in force in Manica land, and that paragraph 17 alleges acts wrongful by Portuguese law, or prove that the acts are wrongful by native laws in force there and applying to foreigners, they may succeed on so much of this paragraph as alleges acts for which an action could have been maintained in England, if the acts had been committed here—otherwise they will fail; but, as this is matter of proof and not of pleading, the defendants' demurrer to this paragraph fails.

The fifth question is, whether the 9th paragraph of the statement of defence is (if proved) a defence to so much of the action as is brought for trespass to persons and goods and conversion of goods. It alleges, in substance, that the lands in question are in the territories of, and belonged to, a native sovereign chief named Mutasa, who granted to the defendants the right to occupy the lands, and that the acts complained of were done at the request and by the authority of the chief, in reasonable resistance to a wrongful attempt by the plaintiffs to take possession of the lands. It seems impossible to say upon a question of general demurrer that this defence, if proved in fact, is insufficient in law. The language of the plea, indeed, leaves it in

(1) 1 H. & C. 219; 31 L. J. (Ex.) 457; 32 L. J. (Ex.) 61.

(2) Law Rep. 6 Q. B. 1.

(3) 1 P. D. 107.

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doubt whether the defence intended is, that the matters complained of were an act of state by the sovereign of the country, or merely that they were acts done by the defendants in protection of their private rights; but in either view it appears sufficient in law, although there may be difficulty in proving that the chief was a sovereign in such a sense that his acts ought to be regarded as the acts of a sovereign in the exercise of his sovereignty, or in proving the other alleged facts. In *Rafael* v. *Verelst* (1775) (1) the plaintiff sued a principal officer of the East India Company for procuring one of the independent native princes of India to imprison the plaintiff. De Grey, C.J., and Blackstone, J., thought that, if the imprisonment was the act of a sovereign prince, the action would not lie, though judgment was ultimately given for the plaintiff upon a verdict to the effect that the native prince acted under compulsion by the defendants. In *Blad's Case* (1674) (2), Lord Nottingham restrained an action against a Dane for a seizure of goods in Iceland, because the seizure appeared to be an act of state in Iceland. In *Dobree* v. *Napier* (1836) (3) the defendant successfully justified the seizure of a British ship in Portugal, by authority of the Queen of Portugal, as an act of state.

It may, indeed, be doubtful whether the plea raises the real ground of defence. The charter of the defendant company, and its treaties with the native chiefs are not before the Court. But if, as in the case of the East India Company, the defendants are authorized by their charter to make treaties of a political character with native chiefs, and to acquire sovereign rights within the territories of those chiefs, and, if the defendants have made such treaties and acquired such rights, and, if the defendants have done the acts complained of in their own character as a sovereign power under such a charter and treaties, then their own acts may have been of the character of acts of state, and not examinable in any municipal Court, according to the principles recognised by Lord Thurlow and by Eyre, C.B., in the case of *Nabob of Arcot* v. *The East India Co.* (1791). (4) If that were

(1) 2 Wm. Bl. 983.
(2) 3 Swan. 604.
(3) 2 Bing. N. C. 781.
(4) 3 Br. Ch. Ca. 292; 4 Br. Ch. Ca. 180; 2 Ves. Jun. 56.

made out by the defendants, the plaintiffs would not be without remedy, but the remedy would be, not legal, but diplomatic, and redress might be sought by Portugal on behalf of the plaintiffs from the Crown of England.

As the general result of all the answers given to the questions arising on the present state of the record, there must be judgment dismissing the action, so far as it claims a declaration of title to land, and also so far as it claims damages or an injunction in relation to trespass to land, on the ground that the action cannot be entertained by this Court, and also so far as regards that portion of the 16th paragraph of the statement of claim which refers to trespass to land. All the other objections in the nature of demurrers, either to the statement of claim or to the statement of defence, must be overruled, and the case must proceed to a trial, in which the questions will be, whether the other acts complained of were committed, and whether they were wrongful according to the local law, or whatever law may be found to have been locally applicable, and whether the 9th paragraph of the defence is made out by proof.

In the other action, that of De Sousa, no question of title or trespass to land is directly raised by the plaintiff; but in other respects the result is the same as in the Mocambique Company's action. The 6th paragraph of the defence in De Sousa's action suggests that, in order to adjudicate upon the personal causes of action, it is necessary to adjudicate upon the title to foreign land. This cannot be a bar to the action for two reasons. The plea does not shew how the title to foreign land can be material to those parts of the claim which allege imprisonment of the plaintiff at Massikesse and conveyance of him as a prisoner to the Cape, or allege conversion of his goods. Secondly, even as regards the other part of the claim, it cannot at present be assumed in this action that the Court will be asked to adjudicate upon the title to foreign land. The title may not be disputed at the trial, or the plaintiff may be able to prove an adjudication of his title by a proper foreign tribunal, and in either case the Court could give him the relief in damages which he claims.

As regards costs, in the Mocambique Company's action, the plaintiffs have failed upon the principal questions, and they must

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pay the costs of this argument in any event. In the other action, the plaintiff and the defendants have each failed; and, as the two cases were properly argued together, and no separate costs of any importance can have been incurred, there will be no order as to costs.

The plaintiffs appealed.

1892. March 29, 30, 31; April 1. *Sir Henry James, Q.C.*, *Bompas, Q.C.*, and *T. Willes Chitty*, for the plaintiffs. The causes of action in respect of which the Divisional Court said that there was no jurisdiction are substantially trespasses to land abroad. It is contended that with respect to them the Courts of this country have jurisdiction.

It is submitted that the High Court has jurisdiction with reference to all causes of action, whether arising here or abroad, over persons within the jurisdiction, even foreigners, except when a remedy is sought in rem, and the subject-matter is abroad, e.g., where a claim is made for actual possession of land out of the jurisdiction. In such a case the judgment could not be enforced, and, therefore, it must be admitted there is no jurisdiction. In the present case the substantial claim is merely for pecuniary damages in respect of trespasses to land. Such a claim does not come within the exception. It may at first sight be thought a startling proposition to say that the Court generally has jurisdiction over causes of action arising abroad; but there is nothing really startling in it. It is clear that such jurisdiction exists in the case of actions of contract and other transitory actions. The reason is, that actions of contract and such like actions are personal actions, and, therefore, actions in which a remedy may be sought against the person within the jurisdiction. The true principle is, that, wherever there is a cause of action to be enforced against the person merely, and the person is within the jurisdiction, the Court has jurisdiction; and the only exception to the jurisdiction of the Court is when the proceeding is in rem and the subject-matter is abroad. The question of jurisdiction, therefore, depends on whether the action is real or personal. The arguments on the other side, and those on which the judgment below

was based, involve a confusion between personal actions in respect of trespasses to land and actions in which a judgment is sought against the land itself.

The question of jurisdiction is really quite distinct from difficulties of procedure with regard to the method of trial arising from the old law as to venue or the ancient distinction between local and transitory actions. The ancient rules with regard to the method of trial may have raised hindrances in many cases in the way of pursuing a remedy in respect of causes of action arising abroad; but that difficulty was one of procedure merely, and had nothing to do with absence of jurisdiction. These hindrances being now removed by the Judicature Rules abolishing local venues, there is nothing to prevent the exercise of the jurisdiction which on principle must be considered to have always existed. When local venues existed, even local actions could always, by order of the Court, be tried elsewhere than in the county in which the cause of action arose, and this shews that the question was one of procedure, not of jurisdiction: *Rex* v. *Harris*. (1) In the absence of such an order, the venue having to be laid in the county in which it was sought to try the action, if it appeared on the trial that the cause of action really arose in some other county in England, then there was a variance which was ground of nonsuit. It is obvious that this did not result from absence of jurisdiction, but was the result of a rule of procedure with regard to mode of trial, viz., that the plaintiff must lay the venue where the cause of action arose, and, therefore, must prove that venue. It followed of course that, if a plaintiff brought in England an action which the Courts regarded as a local action, and it turned out that the cause of action arose abroad, and not where he sought to bring the action, he failed, because he could not prove a venue in England, just as he would have failed if the venue had been laid in one county of England when the cause of action had arisen in another. The decisions with regard to venue were not based on any consideration of jurisdiction. There was no distinction between local and transitory actions so far as jurisdiction was concerned. It was only the rule of procedure as to the venue which prevented a local action from being tried

(1) 3 Burr. 1330.

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anywhere. It must be admitted that the present action would have been a local action in former days, and therefore, the cause of action arising abroad, the action would have failed by reason of the rule of procedure; but, the difficulty of procedure having been now removed, there is no distinction as regards causes of action arising abroad between local and purely transitory actions, and there is jurisdiction over all such causes of action, with the exception of cases in which a remedy in rem is sought. The argument is not so strong with regard to the claims for a declaration of title and an injunction; but it is contended that they are purely personal remedies. The declaration would only affect persons. So far as the injunction is concerned, that being discretionary, it may be doubtful perhaps whether it would be granted as to land abroad. But the claim for damages is purely personal.

Furthermore, it does not appear on this record that the plaintiffs have a remedy in any other Court, and it is a general principle that it is a ground for the existence of jurisdiction, that there is no other Court which has jurisdiction. On that principle the rule was based, that, if a party pleaded to the jurisdiction, he must by his pleading shew a better jurisdiction.

Another point is this. The defendants in the second action set up a treaty made with a chieftain called Mutasa. There is authority that, when a treaty is alleged, the existence of the state or government with whom it is alleged to have been made is not matter of proof. A state may be a recognised state of whose existence the Court must take judicial cognizance, or the Court may inform itself as to the existence of a state by communicating with a Government department on the subject. The Court can only obtain information as to the existence of a state or government from its own inherent knowledge, or by communicating with the English Government; it cannot, when a treaty is alleged with the unrecognised government of rebels or of an uncivilized chieftain, go into evidence whether such a government does or does not exist in fact.

With regard to the first question. Actions were of three kinds—real actions, mixed actions, and purely personal actions. Examples of the first kind were writs of dower and quare im-

pedit. A mixed action was one in which it was sought to recover real property as well as damages, e.g., ejectment. The present is not a real or a mixed action. It is not sought to affect the property *in specie*. There is no authority for saying that an action merely for damages, without any proceeding for recovering or affecting the land itself, is anything but a purely personal action. There seems to have been some confusion of ideas in the Court below; it appears to have been thought that, because the venue in such an action as this would be local, it was in the nature of a real action. A fair summary of the law with regard to venue is given in Gilbert's History of the Common Pleas, c. 7, p. 84, which shews how the distinction between local and transitory actions arose. All actions were originally local, and the jury had to be summoned from persons belonging to the neighbourhood in which the transaction arose, who were supposed to know the circumstances. Then, by a fiction of law, causes of action ex contractu and other transitory causes of action were supposed to arise anywhere, and, therefore, in England, and a false venue in England was allowed to be stated which could not be traversed: *Mostyn* v. *Fabrigas*. (1) The venue in actions with regard to land remained local, because there was not much inconvenience caused thereby. Even in such actions there was a power to change the venue. The whole history of the thing shews that the Courts must have proceeded on the footing that the rules with regard to venue were matters merely of procedure, and had nothing to do with jurisdiction. The only difficulty in the way of trying actions in their nature local, when the cause of action was abroad, was the want of venue. It was a difficulty relating to the mode of trial only. If the Courts in the old time had said that all actions wherever arising should be transitory, there would have been jurisdiction to try all, whether the cause of action arose in England or abroad. Now the legislature has said that all actions shall be transitory. This view of the law is supported by the judgment of Marshall, C.J., in the American case, *Livingston* v. *Jefferson* (2), which was approved of by Bramwell, B., in *Whitaker* v. *Forbes*. (3) And the

(1) 1 Cowp. 161.
(2) 1 Brock. Rep. 203.
(3) 1 C. P. D. 51.

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observations of Lords Cairns, L.C., and Blackburn, J., in the last case are to the same effect. *Rundle* v. *The Delaware Canal* (1) and *Holmes* v. *Barclay* (2) are American authorities to the same effect. How, in the case of transitory actions, when the legal fiction with regard to venue was invented, was the jurisdiction obtained, if it did not exist before? The fiction was only invented for the purpose of giving a venue. There must have been an inherent jurisdiction, though the forms of procedure created a difficulty. The fiction was invented to get rid of this difficulty in certain cases, but it did not create the jurisdiction. The fiction might have been applied originally to all actions. It is now, since the Judicature Act, as if it had been originally extended to all actions. That portion of the doctrine laid down in *Mostyn* v. *Fabrigas* (3) which goes to this, viz., that, if there is no other jurisdiction with regard to the cause of action the English Court has jurisdiction, still stands as good law.

[They cited also on this point *Warren* v. *Webb* (4); *Richardson* v. *Locklin* (5); *Scott* v. *Lord Seymour* (6); *Doulson* v. *Matthews.* (7)]

In *Skinner* v. *East India Co.* (8), decided in 1667, the petitioner complained that the East India Company had seized and taken away his ship and goods, and assaulted him, and dispossessed him of his house and an island in the East Indies. The principal point decided in the case was, how far the House of Lords could by primary action take cognizance of the plaint. Conferences as to the jurisdiction took place between the House of Lords and the House of Commons, the latter objecting to the exercise of primary jurisdiction by the Lords, and the opinion of the judges was taken on one point, which opinion was as follows: "That the matters touching the taking away of the petitioner's ship and goods, and assaulting of his person, notwithstanding the same were done beyond the seas, might be determined upon by His Majesty's ordinary Courts at Westminster; and, as to the dispossessing him of his house and island, that he was not relievable in any ordinary Court of Law." That case is no authority against

(1) 1 Wallace, Jun. 275.
(2) 4 Louisiana Ann. 63.
(3) 1 Cowp. 161.
(4) 1 Taunt. 379.
(5) 34 L. J. (Q.B.) 225.
(6) 1 H. & C. 219.
(7) 4 T. R. 503.
(8) 6 State Trials, 710.

the jurisdiction now contended for. It is admitted that the question of dispossession of house and land abroad could not be tried here, because, if the Court found that the plaintiff was entitled to be repossessed, it could not enforce its judgment. In *Shelling* v. *Farmer* (1) the action was for trespass to a house in the East Indies, and the declaration alleged that the house was situate in London. There was, therefore, a variance between the declaration and the proof, and Eyre, C.J., refused to try the question of trespass to the house because the venue was local; but he never said that he had no jurisdiction. In *Rafael* v. *Verelst* (2), which was an action of false imprisonment, De Grey, C.J. (at p. 1058), said: "Crimes are in their nature local, and the jurisdiction of crimes is local. And so as to the rights of real property, the subject being fixed and immovable. But personal injuries are of a transitory nature, and sequuntur forum rei. And though in all declarations of trespass it is laid contra pacem regis, yet that is only matter of form and not traversable." The dictum as to "rights of real property" is unexplained and obiter. The Chief Justice was probably alluding to real actions in which the judgment would deal with the thing itself, i.e., a judgment which must be applied to the thing itself. What he meant by "rights of real property" is not clear.

Suppose an action of trespass to the person committed abroad, and the defendant pleads, "The plaintiff was on my land, and I, using no more force than was necessary, removed him therefrom," that is a personal action for assault and battery. Can it be said that the Courts here would refuse to try it, because the issue was whether the lands belonged to the plaintiff or the defendant? "Rights of real property" would be involved in that case; but it cannot be disputed that our Courts would, apart from the question of local venue, have jurisdiction to try it. If the defendant were living in this country, he could not be sued for the assault elsewhere. If the Courts have jurisdiction for one purpose they have it for another. Again, suppose an action for breaking and entering the close of the plaintiff abroad, and the only plea is leave and licence: why have not our Courts the same jurisdiction to try the question, whether the plaintiff gave leave and

(1) 1 Str. 646. (2) 2 Wm. Bl. 1055.

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licence, as they have to try any question arising on a contract with respect to land abroad—and they constantly do try such questions? The true rule is, that the Courts can enforce the "rights of real property" in all cases in which the defendant is present, and they are not asked to give a remedy which they cannot enforce, because the land is abroad.

Next, it is a well-established rule of common law that a plea to the jurisdiction should shew a better Court in which the plaintiff could bring his action. There cannot be a total denial of justice to him. The rule is thus stated by Lord Hardwicke, L.C., in *Earl of Derby* v. *Duke of Athol* (1): "Whoever pleads to the jurisdiction of one of the King's Superior Courts of General Jurisdiction, must shew what other Court has jurisdiction." Otherwise, he says, the plea is bad, and "the reason of this is, that in suing for his right a person is not to be sent everywhere to look for a jurisdiction, but must be told what other Court has jurisdiction." The same principle is stated in *Nabob of Arcot* v. *East India Co.* (2), by Lord Thurlow, L.C.; *Rex* v. *Johnson* (3), and *Mostyn* v. *Fabrigas.* (4)

[LORD ESHER, M.R. Must not the proposition receive some limitation? There must be cases in which you could not point out another Court.]

It is submitted that the only limitation is, that there must be a legal wrong.

[FRY, L.J. Are we bound to assume that breaking and entering a close in the centre of South Africa is an actionable wrong there?]

Yes; until the contrary be proved. This Court is asked for a hypothetical judgment, first, assuming that there are Courts in Africa competent to try the case, and secondly assuming there are not. On general principles it would appear that there are no other Courts which could try this action, so long as the defendant remains in England. A defendant who is out of the jurisdiction cannot be sued in the country in which the cause of action arose. As to the law of England in this respect, Blackburn, J., in

(1) 1 Ves. Sen. 201.
(2) 3 Bro. C. C. 292, at pp. 300, 301.
(3) 6 East, 583.
(4) 1 Cowp. 161.

Schibsby v. *Westenholz* (1), held in effect that the defendant must reside in the country in which the action is brought. In *Rousillon* v. *Rousillon* (2), Fry, J., held that a judgment obtained in France against the defendant, who was residing in England, upon a contract made by him in France, could not be enforced in an English Court. In France the domicil of the person sued determines the jurisdiction: Pothier, Traité de la Procédure Civile (ed. 1821), vol. xiv. c. 1, p. 1; Les Actions Personelles, vol. xv. s. 118. In Scotland, in order to found civil jurisdiction, the defender must "either reside in the judge's territory, or be possessed of some estate or subject within it": Erskine's Inst. (Nicholson, 1871), vol. i. p. 35.

The Court of Chancery always claimed to exercise, and has exercised, jurisdiction in cases in which the title to land abroad has been involved. Lord Nottingham, in *Carteret* v. *Petty* (3), states the rule thus: "Wheresoever the defendant may, by personal coercion, be compelled to perform the act decreed, there, after answer put in, the Court shall proceed to a decree," &c. The only exception is, where the judgment of the Court cannot be enforced. The jurisdiction of the Court of Chancery was the same as that of the Courts of Common Law, though the Court of Chancery was not fettered by the rules as to stating a venue in the margin of the pleading, nor by local and transitory venues. The same principle is also stated in *Comes Arglasse* v. *Muschamp* (4); *Toller* v. *Carteret* (5); *Foster* v. *Vassall* (6); *Earl of Dudley* v. *Duke of Athol* (7); *Penn* v. *Lord Baltimore* (8). It is submitted that the decision in *Pike* v. *Hoare* (9) was wrong, and that Eden's note upon that decision (at p. 185 of the report) is correct. It is conceded that when the action is founded upon tort the law of the country in which the tort was committed must prevail: *The Halley.* (10) But the burden of shewing that the law of Africa, with respect to wrongful entry upon

(1) Law Rep. 6 Q. B. 155.
(2) 14 Ch. D. 351.
(3) 2 Swan. 324, n.
(4) 1 Vern. 75.
(5) 2 Vern. 495.
(6) 3 Atk. 586, per Lord Hardwicke, L.C., at p. 589.
(7) 1 Ves. Sen. 201.
(8) 1 Ves. Sen. 444.
(9) 2 Eden. 182.
(10) Law Rep. 2 P. C. 193.

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lands, differs from the law of this country, is on the defendants: *Smith* v. *Gould.* (1) In the absence of proof to the contrary, foreign law must be presumed to be the same as our own: notes to *Mostyn* v. *Fabrigas.* (2) The questions which this Court has to determine are discussed by the authors of Westlake's International Law, 3rd ed., at pp. 224, 225, and Foote's Private International Jurisprudence, 3rd ed., at p. 443. In both the present actions the defendants have pleaded a right to exercise the power and dominion of a sovereign of an independent state, and to imprison. This plea is bad, unless it be established that such a state as Mutasa's exists, and has been recognised as an independent state by the Government of this country. Judicial notice must be taken of its existence or non-existence, after inquiry, if necessary, at the Foreign Office: *Taylor* v. *Barclay* (3); *Jones* v. *Garcia Del Rio* (4). *Way* v. *Yally* (5) is another instance of a transitory action, tried in this country, in which the title to land abroad was involved. The decision of Wood, V.C., in *Holmes* v. *The Queen* (6), which was cited in the judgment of the Divisional Court, does not touch the question in the present case. The grounds of that decision do not apply here. The judgment of the Divisional Court wrongly assumed that the plaintiffs have a remedy in the Courts of Portugal. The defendants could not be sued in Portugal; they do not reside there. The judgment proceeds in effect upon the ground that, if the title to land abroad were not in question, the Courts of this country would have had jurisdiction. That distinction was never drawn where there were local actions. The jurisdiction remains the same. It cannot depend merely on pleading.

[They also referred to *Warren* v. *Webb* (7); *Richardson* v. *Locklin* (8); *Scott* v. *Lord Seymour* (9); *Doulson* v. *Matthews* (10); *Cookney* v. *Anderson* (11); *Mayor of London* v. *Cox* (12); *Becquet* v.

(1) 4 Moo. P. C. 21, per Lord Campbell, at p. 26.
(2) 1 Sm. L. C., 9th ed. p. 684.
(3) 2 Sim. 213.
(4) T. & R. 297.
(5) 6 Mod. 194.
(6) 31 L. J. (Ch.) 58.
(7) 1 Taunt. 379.
(8) 34 L. J. (Q.B.) 225.
(9) 1 H. & C. 219.
(10) 4 T. R. 503.
(11) 1 D. J. & S. 365.
(12) Law Rep. 2 H. L. at p. 261.

McCarthy (1); *Agnew* v. *Usher* (2); *Anon.* (3); *Ilderton* v. *Ilderton* (4); *Robinson* v. *Bland* (5); *Dutch West India Co.* v. *Van Moses* (6); *Rogers* v. *Done* (7); *Tulloch* v. *Hartley* (8); *Martin* v. *Martin* (9); *Massie* v. *Watts* (10); *In re Hawthorne, Graham* v. *Massey.* (11)]

[The plaintiffs' claim for a declaration of title and an injunction was abandoned in the course of the argument.]

Sir Charles Russell, Q.C., Cohen, Q.C., Hollams, and *Lord Robert Cecil,* for the defendants. In De Sousa's action, which is brought simply for assault, battery, and false imprisonment, there is now no plea to the jurisdiction of the Court. There was such a plea originally; but on that point the Divisional Court has decided against the defendants, and they have not appealed. The question, therefore, is whether the plea of justification is a sufficient answer to the plaintiffs' claim. The defendants allege that they acquired the right to the possession and occupation of the land by a treaty, dated September 14, 1890, with Mutasa, who was the native chief who exercised sovereignty over the country; and that, in doing the acts of which the plaintiffs complain, they were acting at the request, and by the authority, of Mutasa. The plaintiffs attempted to take possession of the land, and the defendants acted in defence of their rights. Their right does not depend upon their having sovereign rights; it is sufficient that they should have had the ordinary rights of a landowner. *Taylor* v. *Barclay* (12) was decided on the ground that Spain was a friendly power, and that it would be contrary to the comity of nations to recognise rebels. Title by occupation or possession raises a question of title: possession is primâ facie evidence of title. The questions to be decided are fixed by the order of November 17, 1891. The Court, it is submitted, has no jurisdiction to entertain an action for trespass to land situate in a foreign country, or any claim in relation to such land. The title to the land must come into

(1) 2 B. & A. 951.
(2) 14 Q. B. D. 78.
(3) 2 P. Wms. 75.
(4) 2 H. Bl. 145, 162.
(5) 2 Burr. 1077.
(6) 1 Str. 612.
(7) Sty. 331.
(8) 1 Y. & C. Ch. 114.
(9) 2 Russ. & My. 507.
(10) 6 Cranch Sup. Ct.(U.S.A.) 143.
(11) 23 Ch. D. 743.
(12) 2 Sim. 213.

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question in such an action. The propositions asserted on behalf of the plaintiffs seem to be these: (1.) That the English Courts had an inherent original jurisdiction to entertain, as against a defendant who was within the jurisdiction, any cause of action, wherever it arose, and whether it related to moveable or immoveable property, with the exception of an action of ejectment; (2.) That the exercise of this jurisdiction was formerly prevented only by the technical rules of local venue; (3.) That the Courts of Equity, which were not fettered by those technical rules, always interfered by way of injunction in suits relating to foreign lands against persons within their jurisdiction, though they could not give damages, and now all judges of the High Court have the same jurisdiction; (4.) Now that under the Judicature Act local venue has been abolished, that obstacle to the exercise of the jurisdiction has been removed; (5.) It is said that at any rate the defendants' plea is bad, because it does not shew that any other Court exists in which the plaintiffs could obtain the relief which they claim. This plea is not a plea in abatement or a dilatory plea, it is really a plea in bar.

The English Courts had no such original jurisdiction as is asserted. Jurisdiction is not based on the residence of the defendant within the jurisdiction; it is territorial, and as a general rule the cause of action must arise within the jurisdiction: Story's Conflict of Laws, ss. 537, 543, 544, 550, 552, 553, 555. All actions were originally local. The question of venue as between different countries is not the same as the question of venue as between two counties in England. A distinction ultimately arose between local and transitory actions, and then, when a cause of action arose abroad, the difficulty was evaded by means of a fictitious allegation that a place which was not in England was in England. But an action which related in any way to land situate abroad was never entertained by the Courts of Common Law. The jurisdiction of the Court of Chancery was only in personam: Lewin on Trusts, 9th ed. pp. 47, 48; *Dowdale's Case* (1); *Ward's Case* (2); *Jennings* v. *Hankyn.* (3) The case of *Ilderton* v. *Ilderton* (4) is really an authority strongly

(1) 6 Rep. 47 a.
(2) Latch. 4.
(3) Carth. 11.
(4) 2 H. Bl. 145.

against the plaintiffs, as is shewn by the judgment of Eyre, C.J., at p. 162. According to Story, the Court of Chancery had extended its jurisdiction further than was approved by jurists generally, and Willes, J., agreed with that view. It is difficult to draw the line exactly; but the present case is certainly beyond the line. If an action relates, not to a personal injury, but to a tort in respect of land in a foreign country, this Court cannot try it. The defendants' pleading denies the plaintiffs' title. The injunction claimed would follow on the decision of the action. It is admitted that such an action could not have been tried here before the Judicature Act. *Skinner* v. *East India Co.* (1) is really in favour of the defendants. The question referred to the judges was, "whether the petitioners were relievable upon the matters therein mentioned in law or equity." If such a jurisdiction as is asserted existed, it is almost inconceivable that no judicial decision in favour of it should be found. *Doulson* v. *Matthews* (2) clearly overrules the dicta of Lord Mansfield in *Mostyn* v. *Fabrigas.* (3) In *Phillips* v. *Eyre* (4), Willes, J. (at p. 28), said: "There are restrictions in respect of locality which exclude some foreign causes of action altogether—namely, those which would be local if they arose in England, such as trespass to land," and he referred to *Doulson* v. *Matthews.* (2) He did not say that this restriction was founded merely on the technical rules of local venue. The result of the views expressed by constitutional writers of recognised authority as well as of the decisions, is, that the Courts have never exercised the jurisdiction which is now asserted. The whole tenour of the views of foreign jurists shews, that the want of jurisdiction did not arise out of mere technical rules, and that the jurisdiction assumed by the Courts of Equity was an undue extension of municipal law. The Judicature Act has not enlarged the jurisdiction. The Court of Chancery was not fettered by any rules of local venue; its jurisdiction was in personam. There were only three, or at the most four, classes of cases in which it interfered when the cause of action arose abroad—contract, trust, privity between the parties, and fraud: *Kennedy*

(1) 6 State Trials, 710.
(2) 4 T. R. 503.
(3) 1 Cowp. 161.
(4) Law Rep. 6 Q. B. 1.

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v. *Cassilis* (1); *Toller* v. *Carteret* (2); *Foster* v. *Vassall* (3); *Penn* v. *Lord Baltimore*. (4) In the latter case Lord Hardwicke decreed specific performance of an agreement relating to land in America, and in the first instance he decreed quiet enjoyment; but he afterwards came to the conclusion that he had been wrong in so doing, for he said (p. 455), "It would be improper to have a decree in this Court for quiet enjoyment of lands in America, which would occasion continual applications to this Court for contempts, &c., and that it ought to be the proper jurisdiction." No case can be found in which the Court of Chancery granted an injunction to prevent interference with the quiet enjoyment of land situate in a foreign country. In *Norris* v. *Chambres* (5), Lord Romilly, M.R., refused to declare a lien for a vendor's unpaid purchase-money upon land situate abroad, and in his judgment (at p. 253), he explained the grounds of the limitation of the exercise of the jurisdiction of the Court. The decision was affirmed on appeal. (6) *In re Hawthorne* (7) does not help the plaintiffs. One reason why the Courts of this country had no inherent or original jurisdiction in relation to trespass to land situate abroad was, the difficulty of enforcing their judgments or decrees, and another was, that the idea of territory was the original basis of all jurisdiction. An attempt to exercise jurisdiction in such a case might have brought the Courts into conflict with the rights of foreign powers.

There being no original jurisdiction, jurisdiction has not been acquired indirectly by the operation of the rules under the Judicature Act, which have abolished local venue. In an action for damages quare clausum fregit, the plaintiffs cannot help introducing the nature of the right which they claim. They must first establish their right to the land: it is essential to their cause of action, not merely incidental. The Judicature Acts, as has been often said, were intended only to regulate procedure; they were not meant to give any new jurisdiction. If it had been intended by the abolition of local venue to confer this new

(1) 2 Swan. 313.
(2) 2 Vern. 495.
(3) 3 Atk. 587.
(4) 1 Ves. Sen. 444.
(5) 29 Beav. 246.
(6) 3 D. F. & J. 583.
(7) 23 Ch. D. 743.

jurisdiction, some consideration would have been bestowed on the important international questions which would arise.

Sect. 24 of the Judicature Act does not in any way enlarge jurisdiction. The Admiralty Courts were always recognised as an exception to the general rule that all jurisdiction is territorial: Kent's Commentaries, 12th ed. vol. ii. p. 463.

As to the last point, that the defendants have not shewn by their pleading that there is another and a better Court in which the plaintiffs can obtain relief, the plea is not a dilatory one: *Doulson* v. *Matthews* (1); *Mayor, &c., of London* v. *Cox* (2); *Earl of Derby* v. *Duke of Athol.* (3)

Sir H. James, Q.C., in reply, referred to Stephen on Pleading, 7th ed. p. 241.

The jurisdiction of the Court of Chancery was never founded on any fiction, and it is admitted that it had jurisdiction in regard to extra-territorial contracts. It administered equities which arose abroad as well as those which arose in this country: *Martin* v. *Martin.* (4) In *Norris* v. *Chambres* (5), Lord Romilly, M.R., said, that under some circumstances the Court would appoint a receiver of land situate abroad. The Court would, of course, not make a decree or order which it could not enforce. Assault and entry on land belonging to another person are "natural" wrongs; they are wrongful in every country. If the plaintiffs cannot sue the defendants here, they cannot sue them anywhere. There is no remedy unless the defendants are within the jurisdiction of the Court: *Rex* v. *Johnson* (6); *Doulson* v. *Matthews.* (1) The test of jurisdiction is, that the relief sought is only in damages, i.e., in personam, and that the defendant is within the jurisdiction. That is all which is necessary to enable the Court to exercise jurisdiction, and it is immaterial that the plaintiffs have to prove their title to the land. The Judicature Act has not given any new jurisdiction, but it deals with the jurisdiction which the Courts were formerly capable of exercising, as well as with that which they had actually exercised. There can be no usurpation of jurisdiction, if it is not attempted to

(1) 4 T. R. 503.
(2) Law Rep. 2 H. L. 239, 261.
(3) 1 Ves. Sen. 202.
(4) 2 Russ. & My. 507.
(5) 29 Beav. at p. 253.
(6) 6 East, 583, 598.

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affect the subject-matter which is situate abroad. There is no power under the Rules to serve a foreigner with process out of the jurisdiction. The jurisdiction which the plaintiffs assert is established by *Scott* v. *Lord Seymour* (1) and *Whitaker* v. *Forbes.* (2)

Cur. adv. vult.

May 7. LORD ESHER, M.R., read the following judgment. This case was heard and determined in the Divisional Court under and by virtue of an order, dated November 17, 1891, made by Collins, J., in chambers, by which it was ordered that the question of law raised by pars. 1 and 2 of the defence, and par. 2 (as amended) of the reply, should be forthwith disposed of. The statement of claim asserts that the plaintiffs are a Portuguese company; that the company were in possession and occupation of certain large tracts of land and territories, and gold and other mines, &c., situate in Manica and elsewhere in South Africa. The statement then avers the ownership and suzerainty of the Portuguese State, and a concession by that state of the mines, &c., to the plaintiffs. By par. 7 the plaintiff company, in support of the claims hereinafter set forth, will rely on their being in possession and occupation as aforesaid. Further, or in the alternative, they will rely on the title acquired as stated. The statement of claim then avers that the defendant company, by their servants and agents, wrongfully broke and entered the plaintiff company's said lands and territories, mines, minerals, and mining rights, and forcibly seized and took possession of the said lands and territories, buildings and erections, mines, &c., and ejected the plaintiff company and their servants and agents, &c. By reason of the matters above complained of the plaintiff company have been deprived of and lost the said lands and territories, mines, &c. The statement then sets forth that the plaintiff company claim—(1.) a declaration that they were lawfully in possession of and entitled to, and were and are the owners of and entitled to, the possession and occupation of the said lands and territories, mines, &c.; (2.) an injunction restraining the defendant company, their servants or agents, from continuing or repeating the wrongful

(1) 1 H. & C. 219. (2) 1 C. P. D. 51.

acts and matters aforesaid, and from continuing to occupy, or from asserting any title to, the said lands, &c., and from preventing the plaintiff company, &c., from taking possession thereof, and occupying and exercising and enjoying the same, &c.; (3.) 250,000*l.* damages. The statement of defence in par. 1 is that, as to so much of the statement of claim as alleges title in the plaintiff company to the said lands, &c., and alleges that the defendants, by their servants and agents, wrongfully broke and entered the same, and claims a declaration and an injunction, the defendants, whilst denying the alleged title and the alleged wrongful acts, say that the said lands and territories and mines, &c., are situate abroad—to wit, in South Africa—and out of the jurisdiction of this Honourable Court, and the defendants submit that this Honourable Court has no jurisdiction to adjudicate, and will decline to adjudicate, upon so much of the plaintiffs' claim as aforesaid. The amended reply, as to this paragraph (1.) of the defence, is—(2.) The plaintiffs, in addition to joining issue thereon, will object that par. 1 is bad in law, and they say (1.) that it does not disclose any valid ground of defence; (2.) that the Court has and will exercise jurisdiction to adjudicate on the said claims; (3.) that the said paragraph does not shew that there is any Court, other than that in which this action is brought, having jurisdiction to adjudicate on the said claims; (4.) independently of, and in addition to, the allegations in the above paragraph, the plaintiffs say, that there is no competent tribunal having jurisdiction to adjudicate on the said claims in the country where the acts complained of were committed. The statement of claim in pars. 16 and 17 avers, that the acts complained of were done maliciously and with intent, &c. The statement of defence in par. 2 submits that, as matter of law, the said paragraphs do not, nor does either of them, disclose any valid cause of action. In par. 9 of the defence the defendants allege a concession to them of the lands and mines in question by a native chief named Mutasa, &c. In par. B of the amended reply the plaintiffs object, that the matters alleged in par. 9 of the defence, even if true, which is denied, do not constitute any valid ground of defence.

The first matter to be determined is, what is the question

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of law, or what are the questions of law, which are raised by the pleadings, and which, under and by virtue of the order of the 17th of November, are to be disposed of forthwith. The things done by the defendants, which are complained of by the plaintiffs are, that the defendants, by their servants, broke and entered the lands and territories and mines of the plaintiffs, and forcibly seized and took possession of the same, and ejected the plaintiff company and their servants, &c.; and that the defendants did these acts maliciously and with intent. The plaintiffs assert that these acts were wrongful as against them, because they, the plaintiffs, were owners of the lands, territories, mines, &c., or because they were in possession and occupation of them. The plaintiffs, in respect of these rights of theirs of ownership or possession so infringed as alleged, claim a declaration that they were lawfully in possession, and that they were the owners, and an injunction restraining the defendants from continuing or repeating the wrongful acts, or from asserting any title to the said lands, &c.; and they claim damages for the injury caused to them by the wrongful acts—i.e., by the breaking and entering and ejecting. The defendants by way of answer say, in par. 1 of the defence, that the said lands and territories and mines are situate abroad—to wit, in South Africa, and out of the jurisdiction of the English Court. The plaintiffs reply that par. 1 of the defence discloses no valid ground of defence, and assert that the Court has, and will exercise, jurisdiction to adjudicate on the said claims. The replication then sets forth two reasons why the Court will exercise jurisdiction in this case, although in other cases of similar claims with regard to lands abroad it would not do so.

The questions of law so far raised by the pleadings are, Has the English Court jurisdiction to hear and determine, as against a British subject resident in England, a complaint that he broke and entered and dispossessed the plaintiff of lands and mines, possessed and occupied by or owned by the plaintiff, such lands and mines being situated abroad? Can the English Court make a declaration as to the lawfulness of the plaintiff's possession or ownership? Can the English Court issue an injunction against the defendants? Can the English Court award

damages in respect of the breaking and entering? These questions are independent of the form of pleading—i.e., are to be considered upon the assumption that they are so pleaded as to be brought before the Court. There is another question of law raised by par. 3 of the amended reply—namely, whether the question of the jurisdiction of the Court is properly raised by the defendants' mode of pleading. The questions of law raised by the pars. 16 and 17 of the claim, and by par. 9 of the defence, depend to a certain extent upon the decision of the former questions. The Divisional Court, in a most careful judgment delivered by Wright, J., has dismissed the action so far as it claims a declaration of title to land, and also so far as it claims an injunction in relation to trespass to land, and also so far as it claims damages in respect of trespass to land, and also, as to par. 16, so far as it claims relief in respect of a malicious trespass to land. The judgment maintains the validity of the defence in par. 1 of the defence, and so much of the defence in par. 2 of the defence as relates to the malicious trespass to land, but overrules the defendants' objection to so much of par. 16 as refers to matters other than trespass to land. The judgment overrules the whole of par. 2 of the reply. Against this judgment the plaintiffs have appealed. With regard to the claims of the plaintiffs which have not been overruled, the defendants have not appealed. It seems abundantly clear that by the pleadings the main substantial question in dispute, and intended to be submitted to and determined by the Court, was the title to the lands and mines, and that the plaintiffs claimed a binding declaration by the Court that their title to the land and mines was a good legal title. That claim was urged throughout in the Divisional Court. It is insisted on in the notice of appeal. It was argued before us and persisted in to the fullest degree by Mr. Bompas. But Sir H. James, in a most able argument, relied more particularly on the proposition that the action could be supported on an alternative view—namely, as on a claim for damages only in respect of an intrusion on the plaintiffs' possessory title, in which view he urged that the action was only in personam and a transitory action, because it did not in that view raise any question of title to land. He argued with great earnestness that the only reason

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why the Courts had declined to adjudicate on the title to foreign land was, that the trial of such a question by English law of procedure required a local venue; and, as no local venue in England could be given, the Court could not exercise jurisdiction to try such a question. He said that the requirement of a local venue was a fetter on the jurisdiction, and that now by the Judicature Acts the fetter has been taken off, and therefore the jurisdiction is free. In support of this proposition he maintained that the Court of Chancery, being not bound by the fetter of venue, had always entertained and exercised the jurisdiction. Sir C. Russell, in a condensed but powerful answer, gathered up the propositions enunciated by Sir H. James, and combated each of them. His argument was, therefore, almost, if not entirely, an argument of negation. The main point in the case seems to me to be, whether the English Courts have ever, for the purpose of granting any relief whatever, entertained any action founded directly on an injury to the plaintiff in respect of his right to land or other immovable property situated abroad, and, if not, what has been the real ground of their refusal to do so. Has the refusal been rested on the purely municipal difficulty with regard to the venue of the place where the action is to be tried, or upon a prior and larger difficulty, that the law of England has declined from the beginning to assume jurisdiction? In considering this matter we shall have to deal with, and to give their true meaning to, various expressions used by lawyers—namely, as to property being movable or immovable, as to actions being in personam or in rem, as to actions being transitory or local, as to venue being transitory or local, as to lex fori, lex domicilii, lex rei sitæ. The question, whether the Courts of a nation will or will not entertain jurisdiction of any dispute, is to be determined exclusively by the nation itself—i.e., by its municipal law. If by express legislation the Courts are directed to exercise jurisdiction, the Courts must obey. If there is a proper inference to the same effect, the result is the same. But there are certain rules which have by universal consent indicated the circumstances from which the inference may properly be drawn. We have to consider what is the inference in respect of matters arising abroad. The first great cardinal rule, agreed

upon by all jurists, is one arising necessarily from the division of mankind into nations. "It is plain that the laws of one country can have no intrinsic force, proprio vigore, except within the territorial limits and jurisdiction of that country. . . . Whatever extra-territorial force they are to have is the result, not of any original power to extend them abroad, but of that respect which from motives of public policy other nations are disposed to yield to them, &c.": Story's Conflict of Laws, s. 7. "This is the natural principle flowing from the equality and independence of nations" (s. 8.) "The direct consequence of this rule is, that the laws of every state affect and bind directly all property, whether real or personal, within its territory, and all persons who are resident within it, whether natural-born subjects or aliens, and also all contracts made and acts done within it. A state may therefore regulate . . . . the validity of contracts and other acts done within it; the resulting rights and duties growing out of these contracts and acts; and the remedies and modes of administering justice in all cases calling for the interposition of its tribunals to protect and vindicate and secure the wholesome agency of its own laws, within its own dominions" (s. 18.) "Another maxim or proposition is, that no state or nation can by its laws directly affect or bind property out of its own territory, or bind persons not resident therein" (s. 20). With regard, then, to acts done within the territory of a nation, all are agreed that such nation has without more jurisdiction to determine the resulting rights growing out of those acts; but, with regard to acts done outside its territory it has no jurisdiction to determine the resulting rights growing out of those acts, unless such jurisdiction has been allowed to it by the comity of nations. This reduces the question under discussion to be, whether, in regard to an act of trespass done to land situated outside its territory, there is evidence to justify the inference that by the comity of nations the jurisdiction to determine the rights resulting from such an act has been allowed by other nations to this country, and has been accepted by this country. And the form of the inquiry shews, that the solution of that question does not depend upon the laws of procedure in litigation adopted by this country, but upon the

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comity of nations as between this country and other countries. In a long examination of cases, in which, by a tacit universal consent of all civilized nations, it is to be inferred that each of them has recognised the jurisdiction of other nations in some matters extra-territorial, Story has shewn that all nations have recognised a distinction between what the civil lawyers or writers have called personal and real laws, and between movable and immovable property. As to the former, it is to be noticed that they use the word "statute" as meaning "law." "The civilians have variously defined the different classes of statutes or laws. . . . Personal statutes are held by them to be of general obligation and force everywhere; but real statutes are held to have no extra-territorial force or obligation. 'Personal statutes,' says Merlin, 'are those which have principally for their object the person, and treat only of property incidentally. . . . Real statutes are those which have principally for their object property, and which do not speak of persons except in relation to property'" (s. 13). What are called "personal laws," then, are of general force and obligation everywhere; what are called "real laws" have no extra-territorial force or obligation whatever. This distinction is by universal consent. The next recognised distinction is between different kinds of property. Property is personal, real, or mixed, or it is movable and immovable. It may, for the purpose of international jurisdiction, be divided into 'personal or movable property' and 'real or immovable property' (s. 374). Movables follow the person . . . . The probability is, that the doctrine itself had not its origin in any distinction between real laws or personal laws, or in any fictitious annexation of them to the person of the owner, or in their incapacity to have a fixed situs, but in an enlarged policy, growing out of their transitory nature and the general convenience of nations. If the law rei sitæ were generally to prevail in regard to movables, it would be utterly impossible for the owner in many cases to know in what manner to dispose of them during his life, or to distribute them at his death, not only from the uncertainty of their situation in the transit to and from different places, but from the impracticability of knowing, with minute accuracy, the law of transfers inter vivos,

or of testamentary dispositions and successions in the different countries in which they might happen to be. Any change of place at a future time might defeat the best-considered will; and any sale or donation might be rendered inoperative from the ignorance of the parties of the law of the actual situs at the time of their acts .... A sense of general utility, therefore, must have first suggested the doctrine; and as soon as it was promulgated, it could not fail to recommend itself to all nations by its simplicity, its convenience, and its enlarged policy" (s. 379). "But, be the origin of the doctrine what it may, it has so general a sanction among all civilized nations that it may now be treated as a part of the jus gentium. Lord Loughborough has stated it with great clearness and force in one of his most elaborate judgments: 'It is a clear proposition,' said he, 'not only of the law of England, but of every country in the world where law has the semblance of science, that personal property has no locality.' The meaning of that is, not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner. . . It follows the law of the person" (s. 380). These are the reasons for the general consent as to personal property that it follows the person, and it is the general consent which gives the general jurisdiction. The jurisdiction is prior to any rule of venue made with regard to the method of exercising the jurisdiction. We then have to consider the question, whether, by general consent, the only valid ground on which it can rest, a similar jurisdiction has been given in respect of real or immovable property. "In regard to real or immovable property . . . the general principle of the common law is, that the laws of the place where such property is situate exclusively govern in respect to the rights of the parties, the modes of transfer, and the solemnities which should accompany them" (s. 424). "In the main proposition they"—i.e., foreign jurists—"generally, although not universally, concur, that the law of the situs exclusively governs as to immoveable property" (s. 427). "The common law has avoided all these difficulties by a simple and uniform test. It declares that the law of the situs shall exclusively govern in regard to all rights, interests, and titles in and

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to immovable property" (s. 463). The law of the situs governs all rights in and to land. One right to land is, the right that a stranger shall not enter upon it against the consent of the owner. In ss. 551 and 552, Story further states the opinions of the foreign jurists; and, finally, in s. 554, he states what in his opinion is the law of England—the common law of England: "It will be perceived that in many respects the doctrine here laid down coincides with that of the common law. It has been already stated that, by the common law, personal actions, being transitory, may be brought in any place where the party defendant can be found; that real actions must be brought in the forum rei sitæ; and that mixed actions are properly referable to the same jurisdiction. Among the latter are actions for trespasses and injuries to real property, which are deemed local; so that they will not lie elsewhere than in the place rei sitæ" (s. 554). This is a direct statement of the law upon the very question before us. Upon this long review of a most able treatise, I come to the clear conclusion that an action quare clausum fregit cannot be entertained by an English Court in respect of an alleged wrongful entry on land situated abroad; and that the ground of the inability is, not that by the procedure regulating English litigation there can be no local venue given for the purpose of trial, but that no consent of other nations by way of comity to the exercise of such jurisdiction can be inferred, and that all countries, including England, have consented or agreed that such an action is a real or mixed action, as distinguished from a personal action—that it is an action which regards the rights resulting from the ownership, by possession or otherwise, of the immovable property, the land, and, therefore, that any claim in respect of any alleged injury of any kind to those rights to land cannot be tried in any nation but that in which is the situs of the land—i.e., in which the land is situated. The question is not a question of municipal venue, but of national situs. And, this being so, the whole ingenious argument of Sir H. James falls to the ground, if this is an action in respect of an alleged wrongful entry on land. That the municipal rules of procedure are not to be considered until the question of jurisdiction is

determined is pointed out by Lord Westbury in *Cookney* v. *Anderson* (1): "Any rules which a Court of justice may make touching its procedure must, of course, be taken as intended to apply only to such jurisdiction and authority as it has the right to exercise." That the English rules of venue are rules made for the purpose of determining in what part of England certain causes shall be tried by the English Common Law Court or Courts cannot be denied. They are, therefore, rules for regulating the procedure of the English Court or Courts. They can be applied only to the trial of causes which the English Courts have jurisdiction to try. The question of jurisdiction cannot be made to depend on those rules. It must be determined by other considerations, before those rules can have any application. Lord Westbury said (2): "It would be absurd to suppose that the authority to make orders for the improvement of procedure involved authority to usurp a new jurisdiction, either in respect of persons or of things." And, in the same case, he distinctly states (at p. 380) that, "it is generally agreed by European nations that all questions relating to the ownership of land must be decided by the lex loci rei sitæ." He does not say that the title to the ownership of land must be so decided, but that all questions relating to such ownership must be so decided. The question was very clearly raised and answered in *Skinner* v. *East India Co.* (3) The order of the House of Lords was (p. 719): "That it be referred to all the judges to consider of Skinner's petition, and to report to the House whether the petitioner were relievable upon the matters therein mentioned in law or equity; and, if so, in what manner, upon the several parts of the complaints of the said petition." The judges answered: "That the matters touching the taking away of the petitioner's ship and goods, and assaulting of his person, notwithstanding the same were done beyond the seas, might be determined upon by His Majesty's ordinary Courts at Westminster; and, as to the dispossessing him of his house and island, that he was not relievable in any ordinary Court of Law." It must be observed that the question distinctly referred to the Courts of Equity as well as of law. The answer, therefore,

(1) 1 D. J. & S. at p. 383. (2) 1 D. J. & S. at p. 385.
(3) 6 State Trials, 710.

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is, that the petitioner was not relievable in any Court, either of law or equity. The answer could not have been given in reliance on there being no local venue, in the sense of there being no place of trial, because that difficulty had no application to the Courts of Equity; it must have been founded on the conclusion that for other reasons neither Court had jurisdiction. That opinion of the judges has never been questioned. It has always been followed. It agrees with the distinction I have shewn to have been taken by all the foreign jurists. It is an agreement by the English judges with that distinction—a distinction as to jurisdiction and not as to procedure. The case of *Doulson* v. *Matthews* (1) seems to raise exactly the point taken before us—namely, that where the action asks for damages only it can be maintained. It was an action of trespass for entering the plaintiff's dwelling-house in Canada and expelling him. Lord Kenyon, at the trial, was clearly of opinion that the question was, whether an action of trespass could be brought in this country for the injury stated in the count, and held that it could not, because the cause of action stated in that count was local. Erskine moved to set aside the nonsuit on the ground that "this was not an action to recover the land, but merely a personal action to recover damages, which was transitory, and might be tried here." Buller, J., said (at p. 504): "It is now too late for us to inquire whether it were wise or politic to make a distinction between transitory and local actions; it is sufficient for the Courts that the law has settled the distinction, and that an action quare clausum fregit is local. We may try actions here which are in their nature transitory, though arising out of a transaction abroad, but not such as are in their nature local." The phraseology is important. It is not "such as have a local venue"; it is "such as are in their nature local." It refers, not to the venue which fixes in England the place of trial in all cases which are to be tried in England, but to the distinction recognised in all countries between transitory and local actions—a distinction taken in order to determine whether the Courts of particular countries can or cannot entertain the action at all. The decision is founded in respect of authority on *Skinner's Case* (2), and

(1) 4 T. R. 503. (2) 6 State Trials, 710.

declines to follow the decisions to the contrary of Lord Mansfield, stated by him in *Mostyn* v. *Fabrigas* (1). *Doulson* v. *Matthews* (2) has always been followed, and it has been always treated as overruling the cases mentioned by Lord Mansfield in *Mostyn* v. *Fabrigas*. (1) It has been always so treated both in England and America.

In *Livingston* v. *Jefferson* (3), Marshall, C.J., so distinctly stated. That was an action for breaking and entering territory or property in one state, and the action was tried in another state where the defendant was found. Marshall, C.J., said (at pp. 209, 210): "The distinction taken is, that actions are deemed transitory where the transactions on which they are founded might have taken place anywhere, but are local where their cause is in its nature necessarily local." (They are the words used by Buller, J.) "If this distinction is established; if judges have determined to carry their innovation on the old rule no further; if, under circumstances which have not changed, they have determined this to be the limit of their fiction, for a long course of time, it would require a hardihood which, sitting in this place, I cannot venture on, to pass this limit. This distinction has been repeatedly taken in the books, and is recognised by the best elementary writers, especially by Blackstone, J., from whose authority no man will lightly dissent. He expressly classes an action of trespass on lands with those actions which demand their possession, and which are local, and makes those actions only transitory that are brought on occurrences which might happen anywhere. From the cases that support this distinction no exception, I believe, is to be found among those that have been decided in Court on solemn argument. One of the greatest judges who ever sat upon any bench, and who has done more than any other to remove those technical impediments which grew out of a different state of society, and too long continued to obstruct the course of substantial justice, was so struck with the weakness of the distinction between taking jurisdiction in cases of contracts respecting lands, and of torts committed on the same lands, that he attempted to abolish it. In the case of

(1) 1 Cowp. 161.
(2) 4 T. R. 503.
(3) 1 Brock. 203.

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Mostyn v. *Fabrigas* (1), Lord Mansfield stated the true distinction to be between proceedings which are in rem, in which the effect of the judgment cannot be had, unless the thing lay within the reach of the Court, and proceedings against the person, where damages only are demanded. But this opinion was given in an action for a personal wrong, which is admitted to be transitory. It has not, therefore, the authority to which it would be entitled had this distinction been laid down in an action deemed local, and may be termed an obiter dictum. He recites in that opinion two cases decided by himself, in which an action was sustained for trespass on lands lying in the foreign dominions of His Britannic Majesty. But both those decisions were at nisi prius, and, though the overbearing influence of Lord Mansfield might have sustained them on a motion for a new trial, that motion never was made, and the principle did not obtain the sanction of the Court. In a subsequent case, *Doulson* v. *Matthews* (1792) (2), these decisions are expressly referred to and overruled, and the old distinction is affirmed." Therefore, you have it that Marshall, C.J., in America, who declined jurisdiction on that very ground, distinctly stated that *Doulson* v. *Matthews* (2) overruled those decisions of Lord Mansfield, and that has been the received view of *Doulson* v. *Matthews* (2) always since that in England. The case of *Pike* v. *Hoare* (3) is to the same effect, though not so pointed. But it is important, because it is a decision on a bill in equity. The bill asked for an order directing an issue to try the validity of a will as to real estate in Pennsylvania. Lord Northington refused. "I build my opinion," he said, "materially on the fact of the lands lying in Pennsylvania, for a will of lands lying in any of the colonies is not triable in Westminster Hall." In *Wey* v. *Yally* (4), Holt, C.J., upon a case of *Parker* v. *Damer* (5) being cited, in which the Court had declined to entertain an action of debt against the assignee of a term for rent of land in Ireland, said: "Your case of *Parker* v. *Damer* (5) is good law; for, being brought against the assignee, it is grounded upon the privity of estate, which is local, and therefore to be brought

(1) 1 Cowp. 161.
(2) 4 T. R. 503.
(3) 2 Eden. 182.
(4) 6 Mod. 194.
(5) 3 Mod. 337.

where the land lies." In *Mayor, &c., of London* v. *Cox* (1) we have the great authority of Willes, J., on two points which have been raised in the present case. A dilatory plea to the jurisdiction is a plea admitting the general jurisdiction of the Court, but exempting the defendant's case from the jurisdiction on special grounds (pp. 259–260). But there is a larger objection to jurisdiction, which need not be pleaded, but which, if pleaded, is a plea in bar. Willes, J., said (at p. 261): "Even in superior Courts themselves, where the subject-matter is such as to imply a local limit of jurisdiction, the exception is peremptory; there is no necessity for a dilatory plea, nor is the objection waived by pleading in chief. Thus, if an action of trespass to land situate abroad were brought in the Queen's Bench, the defendant need not plead a dilatory plea shewing what Court has jurisdiction; but if the foreign locality appeared upon the count he might demur; and if it did not appear he might plead in chief or bar a denial of the trespass, and at the trial the plaintiff would be nonsuited or lose the verdict; and whether upon demurrer or plea the ordinary judgment would be given for the defendant: *Doulson* v. *Matthews*." (2) He speaks, not of a local venue, but of a local limit of jurisdiction. In *Whitaker* v. *Forbes* (3) the action was in debt for arrears of a rent-charge upon land in Australia. In my judgment in that case I said (at p. 585): "Where there is no contract or covenant, but the debt only arises by reason of privity of estate, that is to say, when the liability depends on the defendant's being in possession of the estate charged, and not on privity of contract, then the venue is local, and the action must be brought in the locality where the land is situated. Here the action does not arise out of privity of contract, but is founded on a breach of a duty to pay a certain sum arising out of privity of estate. Therefore, if the estate had been in England, the venue must have been laid in the county where the estate was. Here the will was an English will, and we must take it that it does in England create a rent-charge in respect of property in Australia; but, the venue being local, and the land being in Australia, no action

(1) Law Rep. 2 H. L. 239.
(2) 4 T. R. 503.
(3) Law Rep. 10 C. P. 583.

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will lie in England, for the plaintiff cannot bring an action in England that could only be tried in Australia." I think, instead of "venue," I should have said "action." The phrases would have then been "then the action is local" and "the action being local." The judgment of Lindley, J., is more accurate. He said (at p. 586): "Such an action of debt as this—i.e., which arises not from privity of contract but from privity of estate only—is a local action. If this be so, it seems to follow inevitably on the authority of *Doulson* v. *Matthews* (1) that the action is not maintainable in England." The truth is that there are two kinds of venue—the one venue for determining jurisdiction, the other venue for determining place of trial. The one is international, the other municipal. That case was affirmed in the Court of Appeal. (2) For the reasons given in the previous part of this judgment, I cannot adopt the suggestion of Lord Cairns, with regard to which he declines to give any opinion, and I must wholly disagree with the observations of Mr. Justice Blackburn. A great number of cases were cited to us in which the English Courts have exercised jurisdiction in respect of acts done abroad. By universal consent they were triable by English Courts, because they were transitory actions. Nevertheless, the want of a venue for trial was a difficulty in them, which was overcome by a fiction. But such a fiction was never attempted to be used in the real or local actions in which the Courts had no jurisdiction. Questions arising on ordinary or mercantile contracts have always by comity been treated as transitory. Whether a dispute arising on a contract with regard to property or other right in land ought ever to have been entertained, if the land was abroad, has been doubted and questioned. But Lord Hardwicke did entertain such a dispute in *Penn* v. *Lord Baltimore* (3), disclaiming, however, the full jurisdiction to direct that the plaintiff should quietly hold. He founded the jurisdiction which he did exercise upon the ground of a contract or an equity between the parties. I confess that this decision, which has been acted upon by other great judges in equity, seems to me to be open to the strong objection, that the Court is doing indirectly

(1) 4 T. R. 503. (2) 1 C. P. D. 51.

(3) 1 Ves. Sen. 444.

what it dare not do directly. It seems to me that the decision breaks the comity of national consent, because such a contract deals with rights resulting from the ownership of land. The one contracting party contracts to yield rights, and the other party contracts to accept rights, resulting from the ownership of land. And, by the consent of all nations, as I understand the matter, a dispute as to such rights is among nations to be treated as a local action to be tried only in the forum rei sitæ. The doubt, however, is not material in the present case, wherein there is neither contract nor equity. As to the question whether this action can be treated as other than an action for a wrongful entry on land, on the ground that only damages are sought, I can see no possibility of so holding. Damages cannot be asked for as being themselves a cause of action. No one can seek damages on the bare assertion that he is entitled to damages, and therefore claims damages. Damage is sometimes stated to be a cause of action, but then damage means injury. Damages are one of the reliefs asked for as the compensation for an injury. But then the injury is the cause of action; the damages are the relief in respect of the cause of action. In such a case as the present, therefore, the cause of action is the wrongful entry on land, and that cause of action is the only cause which can be relied on in order to support the claim for damages. The cause of action is a wrongful entry on lands abroad, and the Court, therefore, cannot entertain the cause at all. It cannot make a declaration. It cannot issue an injunction. It cannot award damages. The plea is not a dilatory plea, but a plea in bar. The question whether Mutasa can or cannot make a valid concession is immaterial. If not, I say that any person who is in possession of a country or region, and who exercises therein the powers of ruler, no other person assuming to be superior to him, is sufficiently to be vouched as the grantor of a concession of land in that country or region, more especially if the power to grant such a concession is recognised by the national executive. As to the contention that the Courts of a country can assume jurisdiction in respect of extra-territorial acts, over which they have otherwise no jurisdiction, on the mere ground that, if they do not, the plaintiff has no remedy anywhere, I am of opinion

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that it does not bear examination. It is claiming too ambitious a providence. It was a noble ambition; but it is without recognition or authority.

I am of opinion that the judgment of the Divisional Court is right on all points. The appeal should, in my opinion, be dismissed.

FRY, L.J., read the following judgment. The plaintiffs allege themselves to be interested in lands in Africa of two kinds—the one, lands situated within territories acquired by Portugal, and granted by that State to the plaintiffs; the other, lands acquired by grants from native chiefs; they rely on title as regards both these kinds of land, and they also, and alternatively, rely on the fact of possession; they allege acts of trespass on these lands committed by the defendants; and they further allege that there is no competent tribunal having jurisdiction to adjudicate on their claims in the country where the acts complained of were committed. The relief which the plaintiffs have sought, so far as it relates in any way to the land, may conveniently be divided into four parts—first, a declaration of their title; secondly, an injunction to support and give effect to that declaration; thirdly, damages for trespass to the land; and, fourthly, an injunction to prevent future trespasses. The most important question in the Court below was, whether the Court could entertain jurisdiction to make a declaration as to the title to foreign lands; this point has been abandoned, or not pressed on us, on the appeal, and we are not therefore concerned either with this declaration of title or with the injunction sought in aid of it. Our concern now is with this question, Can this Court, now that there is no local venue for the trial of any action, entertain jurisdiction in an action brought against a person resident in England for damages for trespass to land situate out of England in a place where there is no Court of competent jurisdiction? If the question be considered historically, and with reference to the Courts before the 18th century, the answer must, in my judgment, be in the negative. So long as all actions were local, it is obvious that no action (whether it related merely to matters personal or to immovable property), in which the cause of action arose beyond

the boundary of some county, could possibly be tried in any Court of England. When the distinction arose between local and transitory actions, and the further step was taken of allowing transitory actions, where the cause arose out of England, and such actions only, to be tried within the jurisdiction, trespass quare clausum fregit was held to be a local action, and consequently such an action in respect of land abroad could never be tried in any Court of the nation. The King's Courts, as is well known, exercised originally only a limited jurisdiction; they were hemmed in on every side, sometimes by the palatine jurisdictions existing in several counties, sometimes by feudal jurisdictions, and sometimes by the rights of cities and boroughs; and they were hampered by the limited extent both in space and time of the King's peace, and still more by the forms of action. But gradually their jurisdiction was extended, especially by the legislation and the quo warranto proceedings of Edward I., until in the lapse of time it burst the barriers within which it was originally confined, and came to be not inaptly described as "a universal jurisdiction and superintendency." The obligation enforced by the Statute of Westminster to find new writs for new cases, "lest it happen for the future that the Court of our lord the King be deficient in doing justice to the suitors"; the consequent development of the action on the case; the invention of various fictions to found jurisdiction; and the subsequent discarding of those very fictions, because the right and duty of the Court stood upon a wider and stronger foundation—all these things are evidence of the growth of the jurisdiction of the King's Courts. For long years past they have set before themselves the maxim, "Ubi jus ibi remedium;" so that it would be hardly wrong to assert that, as against every one resident in England, the Courts of this country have jurisdiction in every case in which they ought to have jurisdiction. With these wider and more intelligent views of the functions of the superior Courts it is not wonderful to find that the question of jurisdiction in cases of trespass to lands abroad came under their notice. First, it appears to have come before Lord Hardwicke, sitting in the Court of Chancery, which at that time had not renounced a claim to award damages. The case arose, according to Lord

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Mansfield's account of it, in respect of an injury to land in the East Indies, and was not much contested; but Lord Hardwicke directed satisfaction to be made in damages. Eyre, C.J., overruled an objection to the jurisdiction in a similar case; and in two actions, hereafter to be more fully mentioned, Lord Mansfield did the same. These cases gave rise to two questions—first, ought the Courts of this country on general principles to possess the jurisdiction invoked; and secondly, if yes, then ought the rule of procedure as regards the place of trial to be allowed any longer to stand in the way of the assertion of the jurisdiction? These decisions shew that the three great judges whom I have named thought that in such cases jurisdiction ought to be entertained by the Courts of this country; and these cases, which were at common law, shew that the two chief justices further thought that the formal objection arising from the distinction between local and transitory actions ought to be cast aside as a worn-out fetter. This question came under review in the great case of *Mostyn* v. *Fabrigas* (1), and, though the action there was in respect of personal wrongs only, Lord Mansfield dealt also with the cases relating to injury to land. "There is," Lord Mansfield said (at p. 176), "a formal and a substantial distinction as to the locality of trials. I state them as different things; the substantial distinction is, where the proceeding is in rem, and where the effect of the judgment cannot be had, if it is laid in a wrong place. . . . With regard to matters that arise out of the realm, there is a substantial distinction of locality too; for there are some cases that arise out of the realm which ought not to be tried anywhere but in the country where they arise." Then, after discussing but not deciding the question whether, if two persons fought in France, and both happening casually to be here, one could maintain an action of assault against the other, he proceeded: "If an action were brought relative to an estate in a foreign country, where the question was a matter of title only, and not of damages, there might be a solid distinction of locality." Now, pausing here, it is obvious that the Court of King's Bench, presided over by Lord Mansfield (for all the puisne judges concurred in his

(1) 1 Cowp. 161.

decision), held that, as regards realty, the question was, whether the appropriate judgment was one that could be enforced against the land, in which case the proceeding must be in the locus rei sitæ, or was one in damages only—in which case the plaintiff might follow the person of the defendant. Having thus explained the substantial distinction, Lord Mansfield addressed himself to the formal one arising from the mode of trial, then dealt with cases of transitory actions for personal injuries abroad, and then gave an account of the cases of local actions for injuries to real property abroad to which I have already referred. "I have had," he said (at p. 180), "some actions before me, rather going further than these transitory actions, that is, going to cases which in England would be local actions. I remember one—I think it was an action brought against Captain Gambier, who by order of Admiral Boscawen had pulled down the houses of some sutlers who supplied the Navy and sailors with spirituous liquors; and, whether the act was right or wrong, it was certainly done with a good intention on the part of the admiral, for the health of the sailors was affected by frequenting them. They were pulled down. The captain was inattentive enough to bring the sutler over in his own ship, who would never have got to England otherwise; and as soon as he came here he was advised that he should bring an action against the captain. He brought his action, and one of the counts in the declaration was, for pulling down the houses. The objection was taken to the count for pulling down the houses, and the case of *Skinner* v. *East India Co.* (1) was cited in support of the objection. On the other side they produced from a manuscript note a case before Eyre, C.J., where he overruled the objection; and I overruled the objection upon this principle, viz., that the reparation here was personal and for damages, and that otherwise there would be a failure of justice; for it was upon the coast of Nova Scotia, where there were no regular Courts of Judicature; but, if there had been, Captain Gambier might never go there again, and, therefore, the reason of locality in such an action in England did not hold. I quoted a case of an injury of that sort in the East Indies, where, even in a Court of Equity, Lord Hardwicke had directed

(1) 6 State Trials, 710.

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satisfaction to be made in damages. That case before Lord Hardwicke was not much contested; but this case before me was fully and seriously argued, and 1000*l.* damages given against Captain Gambier. I do not quote this for the authority of my opinion, because that opinion is very likely to be erroneous, but I quote it for this reason: 1000*l.* damages and the costs were a considerable sum. As the captain had acted by the orders of Admiral Boscawen, the representatives of the admiral defended the cause, and paid the damages and costs recovered. The case was favourable, for what the admiral did was certainly well intended, and yet there was no motion for a new trial. I recollect another cause that came on before me, which was the case of Admiral Palliser. There the very gist of the action was local: it was for destroying fishing-huts upon the Labrador coast. After the treaty of Paris the Canadians early in the season erected huts for fishing, and by that means got an advantage, by beginning earlier, of the fishermen who came from England. It was a nice question upon the right of the Canadians. However, the admiral from general principles of policy ordered these huts to be destroyed. The cause went on a great way. The defendant would have stopped it short at once, if he could have made such an objection; but it was not made. There are no local Courts among the Esquimaux Indians upon that part of the Labrador coast, and therefore whatever any injury had been done there by any of the King's officers would have been altogether without redress, if the objection of locality would have held. The consequence of that circumstance shews that where the reason fails, even in actions which in England would be local actions, yet it does not hold to places beyond the seas within the King's dominions. Admiral Palliser's case went off upon a proposal of a reference, and ended by an award." I have quoted this passage at full length because the cases recited by Lord Mansfield are in pari materia with the one now before us, and because it appears that the Court of Queen's Bench then entertained these two propositions: first, that on general principles the jurisdiction in question ought to exist; and, secondly, that the formal difficulty as to the mode of trial ought to be rejected. In *Doulson* v. *Matthews* (1)

(1) 4 T. R. 503.

the Court of King's Bench, presided over by Lord Kenyon, refused to follow Lord Mansfield to the full extent, and held that an action for damages quare clausum fregit in respect of land abroad would not lie. The judgment of Buller, J., which is the principal one reported, seems to rely on the technical, not on any substantial difficulty. That technical difficulty having been swept away by the Judicature Act of 1873 and the subsequent Rules of Court, ought not the doctrine of Lord Mansfield as regards the real distinction to be revived? These cases have been considered in America by one of the greatest judges of the United States, Marshall, C.J., who adopted, we shall find, the opinion of Lord Kenyon as to the validity of the fetter on the jurisdiction, but the opinion of Lord Mansfield as to the existence of the jurisdiction on general principles.

In *Livingston* v. *Jefferson* (1) the question was, whether the United States Circuit Court for Virginia could take cognizance of a trespass to lands situate beyond the district as against a resident of Virginia; and in the course of his judgment the Chief Justice said (at p. 208) that the Courts "have, without legislative aid, applied this fiction to all personal torts, wherever the wrong may have been committed, and to all contracts, wherever executed. To this general rule contracts respecting lands form no exception. It is admitted that, on a contract respecting lands, an action is sustainable wherever the defendant may be found. Yet in such a case every difficulty may occur that presents itself in an action of trespass. An investigation of title may become necessary, a question of boundary may arise, and a survey may be essential to the full merits of the cause. Yet these difficulties have not prevailed against the jurisdiction of the Court. They are countervailed, and more than countervailed, by the opposing consideration, that, if the action be disallowed, the injured party may have a clear right without a remedy, in a case where a person who has done the wrong, and who ought to make the compensation, is within the power of the Court. That this consideration should lose its influence where the action pursues a thing not in the reach of the Court is of inevitable necessity; but for the loss of its influence where the remedy is against the

(1) 1 Brock. 203.

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person, and is within the power of the Court, I have not yet discerned a reason, other than a technical one, which can satisfy my judgment." The Chief Justice then proceeds to consider the technical difficulty, and yields to it as inveterate. But it is obvious that, if it had been removed by legislative enactment in Virginia, as it has been removed in England, the great authority of Marshall, C.J., would have been in favour of asserting jurisdiction. The judgment of Marshall, C.J., in the case I have cited received the express approval of Lord Bramwell (then a Baron) in *Whitaker* v. *Forbes*. (1) Another great American authority, Story, J., supports the same view. "Lord Mansfield's doctrine," says the learned writer, "has been since overruled as untenable according to the actual jurisprudence of England, however maintainable it might be upon general principles of international law, if the suit were for personal damages only": Story's Conflict of Laws, s. 554. Again, the Supreme Court of Louisiana have held an action maintainable against defendants resident in Louisiana in respect of an injury to real estate done by them in the State of Illinois. "The present action," said Eustis, C.J., "is under our laws a personal action, and is not distinguished from any ordinary civil action as to the place or tribunal in which it may be brought": *Holmes* v. *Barclay*. (2) Lastly, in *Whitaker* v. *Forbes* (3), begun before, but tried after, the passing of the Judicature Acts, the question arose, whether a plaintiff could recover against a defendant resident in this country the arrears of a rent-charge issuing out of lands in Australia. Lord Blackburn (then Blackburn, J.), sitting in the Court of Appeal, emphasized the distinction between jurisdiction and venue. "I do not think this case," said that learned judge, "raises any question as to jurisdiction, though in some respects it has been argued as if it did. The case turns on the technical distinction between local actions, where the trial must be local, and transitory actions, and the question is one of venue only." The judgments of the other members of the Court of Appeal, though not so immediately in point, lean in the same direction.

(1) 1 C. P. D. at p. 53.

(2) Cases in Supreme Court of Louisiana, vol iv., for the year 1849, p. 63.

(3) Law Rep. 10 C. P. 583; 1 C. P. D. 51.

The Court of Chancery has always been free from any fetter as to the mode of trial. Where, then, did that Court draw the limit as to jurisdiction in respect of matters relative to immovable estate abroad? It drew it, as appears to me to be plain, at the point where Lord Mansfield had drawn it—at the point at which the power of the Court ceased. The Court could not entertain a suit for partition of lands abroad, because the Court could not award a commission into foreign parts, nor effectually order possession to be given in pursuance of its decree; for the like reason it would not decree possession of lands in Scotland. But, where the relief sought is personal only, the Court has not hesitated to act on the person in respect of lands abroad. Contracts have been executed, trusts enforced, foreclosure decreed, and fraud relieved against, all in reference to lands abroad. The Equity Courts of New York and Virginia have enforced the like doctrine (2 Kent Com. 463). These cases have always been maintained on the doctrine that equity acts against the person; so does a judgment for damages; and it is difficult to see why one action against the person should be allowed and another disallowed. In a case like the present, where, according to the allegations of the plaintiffs, there are no Courts of adequate jurisdiction in the locus rei sitæ, it is obvious that to repel the jurisdiction is to produce a total failure of justice. If neither Africa nor England afford a forum the plaintiff is remediless. But suppose that the Portuguese Courts have jurisdiction. If their system of jurisprudence be like ours, these Courts would have no power over the defendants, unless they happen to have a residence or property within the Portuguese dominions; and, so long as this is not the case, and it may be so for ever, the plaintiffs are again without remedy.

Our Rules do not permit service out of the jurisdiction of a writ, or notice of a writ, in respect of any tort done within the jurisdiction. Upon what principle can these Rules be justified, except upon the view that the Courts of the residence of the wrongdoer will entertain jurisdiction in respect of all torts done here, whether relating to land or not?

Suppose that in a foreign country A. enters upon a close, of which B. claims to be in possession, and each assaults the other,

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and both A. and B. come to this country. A. could sue B. here for the personal injury, although B.'s defence might be the possession of the close; it would be strange if B. could not also sue A. for entry on the close. Or, again, suppose in a foreign land A. enters upon the house of B., and injures the house, the furniture, and the person of B., and both A. and B. come hither. It would be strange if B. could sue A. for the injuries to his furniture and his person, but not to his house.

In entertaining actions for wrong to the person done abroad, the Courts may be called upon to enter upon inquiries with regard to foreign law which may be very difficult, and to express judgment on points in respect of which foreign nations may be highly sensitive. They may have to decide on the law relative to torts; they may have to determine the rights of the ministers of the law, or of the servants of the Crown. They need not then, one would think, be alarmed at having incidentally, and when needful, to ascertain the laws governing immovables in the foreign country. For these reasons I think that the abolition of local venue for the trial for every action has removed the sole formal difficulty which stood in the way of trying an action for trespass to land abroad; that there is now nothing to withdraw this case from the general rule of international law, that the plaintiff shall seek relief in the forum of the defendant's residence; and that the Court ought, therefore, to entertain jurisdiction in this case, so far as relates to the claim for damages for trespass to the land in the possession of the plaintiffs. I observe with satisfaction that the opinion of the Divisional Court on this point is far less distinct than on the question with which they were mainly occupied. If the case ought to be heard on the question of trespass to the land, it is obvious that the question of injunction to prevent future damage ought to stand over till the trial, as the question may be one of discretion. A question may, perhaps, hereafter arise as to whether there can be a tort to immovable estate according to the laws of a country where there is no Court adequate to deal with it. On this question I express no opinion, because it has not been argued. With regard to so much of the defence as relies upon the authority of the chief Mutasa as a justification

for the acts alleged, it appears to me that the production of the document entered into by that chief, with the appended note of Lord Knutsford, one of Her Majesty's Secretaries of State, is sufficient primâ facie recognition of the sovereign rights of that chief to make it proper to leave the point open for further consideration at the trial of the action.

LOPES, L.J. So much of the statement of claim as seeks a declaration of the plaintiffs' title to the land in question, and an injunction restraining the defendants from interfering therewith, has been abandoned. But the plaintiffs contend that they are entitled to maintain so much of their claim as seeks damages for a trespass to their land, and an injunction to restrain the defendants from continuing and repeating such trespass. The claim for a declaration of title is abandoned, because the Courts in this country could not enforce their judgment or decree, when the land is situate out of the jurisdiction; the claim for breaking and entering the plaintiffs' land is maintained because it is contended that the Courts of this country have an inherent jurisdiction to try an action for trespass to land abroad in personam, when the defendant is resident in this country within the jurisdiction, and when there is no Court of competent jurisdiction in the locus rei sitæ. It is admitted that this alleged inherent jurisdiction in respect of trespass to land abroad has never before been exercised. It is admitted also that, if it existed, it could not have been exercised before 1873, when local venues were abolished by the Judicature Act of that year. Was it not exercised because it did not exist, or because, up to 1873, there was a technical impediment to its exercise in the shape of local venue? This is the important question to be decided in this case. I do not propose to retrace ground so ably and fully occupied by the judgment which has been delivered by my brother Fry, or again to cite at length cases upon which reliance has been placed. If this were not a case of exceptional importance, I should be satisfied by saying that I agree with the views expressed in the judgment last delivered. I shall shortly give my reasons for the conclusion at which I have arrived. I believe the Courts of this country have, and

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always had, the inherent jurisdiction contended for—viz., to try an action for trespass to land such as the present—and were only prevented from doing so owing to the technical rule of local venue. The difficulties as to local actions, such as trespass to land abroad, being tried in the Courts of the realm arose from the technical rules as to the necessity in such cases for a local venue, as distinguished from any inherent want of jurisdiction in our Courts to try them. All actions were originally local, and, whether they concerned movable or immovable property, were only triable in the locality in which they arose. If the cause of action arose abroad, outside the boundary of any county, the Courts here could not entertain it, because no local venue could be assigned to it. With regard to causes of action which might arise anywhere, this was found inconvenient; and the Courts, in order to relieve themselves, made a distinction between transitory matters, which might happen anywhere, and local ones, such as trespass to realty, which could only happen in one particular place. In transitory matters the plaintiff might lay his venue where he pleased, and the defendant was bound to follow it, unless his defence consisted of some matter which in its nature was local. With regard to transitory matters abroad the difficulty was obviated by a fiction. The creation of a fiction, however, could not give jurisdiction, unless jurisdiction had existed; but the creation of a fiction could, as it did, remove the fetter imposed by the technical rule of local venue. The rule, however, with regard to local venue in respect to local matters continued down to 1873, when local venues were abolished. Trespass to land was a local action, and no action in respect to land abroad could be tried in our Courts before that date. I presume the same fiction might have been adopted with regard to local matters abroad as was adopted with regard to transitory matters abroad, provided the defendant was resident within the jurisdiction and the remedy was in personam. It was, however, not thought desirable to extend the fiction to matters local; the local venue with regard to matters local no doubt had its advantages—it was convenient that the jurors summoned should have some knowledge of the locus in quo, it was convenient for the purpose of a view, and other reasons

might be suggested which would account for the retention of the local venue when it had been relaxed in matters transitory. Although the defendant might be within the jurisdiction, and the remedy sought against him have been a remedy in personam, so long as the local venue existed it was impossible for the Common Law Courts to entertain actions for trespass to lands abroad. I cannot doubt, however, that there was an inherent dormant jurisdiction in our Courts, fettered and controlled only by the local venue, to try actions for trespass to lands abroad. The nonrequirement of local venue in matters transitory, coupled with the fiction, had liberated the jurisdiction, and enabled our Courts to try matters abroad not subject to local venue, where a suitable remedy could be enforced against the person. Why should not the abolition of local venue have the same operation in matters local when the defendant is within the jurisdiction and the remedy—viz., recovery of damages—is enforceable against his person? Actions for assault and battery would lie, although committed abroad, and this, although the defendant may have justified by pleading a trespass on his land abroad by the plaintiff, and a removal of the plaintiff therefrom on that account. Why not actions for trespass to land abroad, now that the fetter of the local venue is removed? They both sound in damages, and the remedy is enforceable against the person. Why should there be jurisdiction in the one case and not in the other? An action, again, for breach of contract in respect of land abroad would lie against a defendant resident within the jurisdiction, although questions of the most intricate kind might incidentally arise with regard to such land. Courts of Equity, unfettered by local venue, entertained suits affecting lands abroad. They decreed specific performance of articles concerning boundaries abroad; they foreclosed mortgages of land abroad; they enforced trusts and relieved against fraud abroad. They seem only to have stayed their hand when they were unable to enforce the suitable remedy. So long as the relief sought was personal, they have unhesitatingly interfered. How can this action of the Courts of Equity be explained, unless they possessed an inherent jurisdiction to entertain such matters, when they had power to enforce their decisions against a person within the

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jurisdiction? In these circumstances it is difficult to understand why an action for trespass to land will not lie. I believe the true principle to be, now that the fetter of local venue is removed, that the Courts of this realm have jurisdiction to try all causes of action arising abroad when the defendant is within the jurisdiction, and the Courts here can give effect to their jurisdiction by applying the suitable remedy; but that where they cannot apply the suitable remedy—e.g., in ejectment, partition of land, and other such cases—they have no jurisdiction, because they are powerless to enforce a remedy. I find no case inconsistent with this view; many authoritative expressions in favour of it.

The most instructive case on the subject is *Mostyn* v. *Fabrigas*. (1) This was an action for trespass to the person; but there are expressions and dicta of Lord Mansfield which make it abundantly clear that he thought that the difficulty with regard to local actions, such as trespass to land, arose, not from any want of jurisdiction, but from restrictions with regard to locality. I forbear to cite passages from this case, because they have already been cited at length by my brother Fry. I also abstain from referring to the American cases which have been cited; but it is worthy of observation that in *Whitaker* v. *Forbes* (2) Lord Bramwell (then Baron Bramwell) approved of the judgment of Marshall, C.J., in *Livingston* v. *Jefferson* (3). *Whitaker* v. *Forbes* (4) was an action for arrears of a rent-charge on land in Australia prior to the commencement of the Judicature Act, and it was held that the venue in such an action was local, and that it could not therefore be maintained in this country. Lord Cairns made some observations which clearly shew that he anticipated that the point would arise, which we are called upon to decide now. He said (at p. 52): "The recent legislation provides that for the future there shall be no distinction between local and personal actions as regards venue. It may be that hereafter such an action as this would be maintainable; but it is not necessary to express an opinion on the point." Bramwell, B. (at p. 53), said: "I will add nothing, except to refer to the American case of *Livingston* v. *Jefferson* (3), where the law

(1) 1 Cowp. 161.
(2) 1 C. P. D. 51, 53.
(3) 1 Brock. 203.
(4) 1 C. P. D. 51.

on this subject seems to have been ably summarized by Marshall, C.J." And Blackburn, J. (at p. 53), says: "I do not think this case raises any question as to jurisdiction, though in some respects it has been argued as if it did. The case turns on the technical distinction between local actions, where the trial must be local, and transitory actions, and the question is one of venue only." In *Skinner* v. *East India Co.* (1), the plaintiff complained that he had been assaulted, robbed, and dispossessed of land in the Indies. It was eventually held that that part of his claim which dealt with the island, which was then under the dominion of a foreign prince, could not be maintained. This case is not inconsistent with the relief asked for in the present action, because the plaintiff there asked to be reinstated. Moreover, there was the difficulty of local venue. *Doulson* v. *Matthews* (2) was an action of trespass for entering the plaintiff's dwelling-house in Canada and expelling him, and the question was, whether an action of trespass could be brought in this country. Lord Kenyon thought the action was local, and would not lie. But why? Not for want of jurisdiction, but because the action was local, or, in other words, because of the technical objection as to local venue. Buller, J., said (at p. 504): "It is now too late for us to inquire whether it were wise or politic to make a distinction between transitory and local actions; it is sufficient for the Courts that the law has settled the distinction, and that an action quare clausum fregit is local. We may try actions here which are in their nature transitory, though arising out of a transaction abroad, but not such as are in their nature local." The latter part of s. 554 in Story's Conflict of Laws is a strong authority in favour of the conclusion at which I have arrived. The learned author, after stating that "personal actions, being transitory, may be brought in any place where the party defendant can be found, that real actions must be brought in the forum rei sitæ, and that mixed actions are properly referable to the same jurisdiction," and that actions for trespass to real property must be brought in the place rei sitæ, proceeds: "This distinction was recognised as long ago as 1665, in *Skinner* v. *East India Co.* (1), where the twelve judges certified that, for

(1) 6 State Trials, 710. (2) 4 T. R. 503.

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torts to the person and personal property done abroad, a remedy lay in a suit in personam in England, but that for torts to real property or to fixtures abroad no suit lay. Lord Mansfield and Lord Chief Justice Eyre held at one time a different doctrine, and allowed suits to be maintained in England for injuries done by pulling down houses in foreign unsettled regions, viz., in the desert coasts of Nova Scotia and Labrador. But this doctrine has been since overruled as untenable according to the actual jurisprudence of England, however maintainable it might be upon general principles of international law, if the suit were for personal damages only." I understand actual "jurisprudence of England" to mean and refer to local venue, which the learned author thinks the only impediment to the exercise of a jurisdiction which Lord Mansfield believed to exist. I am of opinion, therefore, that the plaintiffs' claim for trespass to land can be entertained, and I am unable to agree with the Court below in this respect. A declaration of title and injunction to enforce it was abandoned by the plaintiffs. It is unnecessary, therefore, to express any opinion on that part of the case. As to the question raised by the plea justifying under Mutasa, I think a sufficient primâ facie case has been made out to entitle the defendants to have that question tried.

Appeal allowed.

The terms of the order on the appeal were settled by Fry, L.J., as follows:—

The plaintiffs by their counsel at the bar having abandoned their appeal, so far as it related to the declaration that the plaintiff company was lawfully in possession of, and entitled to the possession and occupation of, the lands and territories, mines and minerals, and mining rights, and other property in the statement of claim mentioned, and also so far as it related to an injunction restraining the defendant company from continuing to occupy, or from asserting any title to, the said lands, territories, mines, minerals, and mining rights, buildings and erections, and from withholding and keeping possession of the said other property, this Court doth direct that the order of the Divisional Court do stand affirmed as regards so much of the relief sought

by the statement of claim as aforesaid; but, as to the residue of the relief sought by the statement of claim, this Court doth declare that Her Majesty's Supreme Court has jurisdiction to entertain the same.

No order as to the costs of the appeal, or as to the costs in the Divisional Court.

Solicitors: *Bompas, Bischoff & Co.*; *Hollams, Sons, Coward, & Hawksley.*

W. L. C.

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May 5, 16.

Licensing Acts—Licence—Inn—Change of Occupation—Refusal of Renewal to New Tenant—Expiration of Licence—Subsequent Application for Licence by Second New Tenant—Jurisdiction of Justices—9 Geo. 4, c. 61, s. 14.

By 9 Geo. 4, c. 61, s. 14: "If any person duly licensed under this Act shall before the expiration of such licence . . . . remove from or yield up the possession of the house specified in such licence; or if the occupier of any such house, being about to quit the same, shall have wilfully omitted or shall have neglected to apply, at the general annual licensing meeting or at any adjournment thereof, for a licence to continue to sell exciseable liquors by retail, to be drunk or consumed in such house, it shall be lawful for the justices assembled as aforesaid at a special session . . . . to grant to . . . . any new tenant or occupier of any house having so become unoccupied . . . . a licence to sell exciseable liquors by retail . . . . "

The licence-holder of an inn yielded up possession of the premises in December, 1890; at a special session in May, 1891, a new tenant unsuccessfully applied for a transfer of the licence; at the adjourned general annual licensing meeting in September, 1891, another new tenant unsuccessfully applied for a renewal of the licence; neither of the applicants appealed to quarter sessions. The then current licence expired on October 10, 1891. In March, 1892, the appellant, who had become tenant of the house, applied, under 9 Geo. 4, c. 61, s. 14, for a licence:—

Held, that the justices had jurisdiction to grant the application.

Reg. v. *Justices of Liverpool* (11 Q. B. D. 638) considered and followed.

CASE stated by justices for the borough of Dover upon appeal against their refusal of an application under 9 Geo. 4, c. 61, s. 14, for a licence for the sale of intoxicating liquors, from which the following facts appeared.

In January, 1889, the licence in respect of the Prince Albert

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Inn, Broadstairs, a fully-licensed house, was duly transferred to Wm. Greaves, and it was renewed to him at the general annual licensing meeting in 1889. The house was closed by Greaves shortly before the annual licensing meeting in 1890; but he remained in possession, and the licence was renewed to him at that meeting. Greaves removed from and gave up possession of the premises in December, 1890, and the house had ever since remained closed.

At a special licensing sessions held on May 1, 1891, an application was made for a transfer of the licence held by Greaves to Joseph Walsh; but the application was refused, and no appeal against the refusal was made to quarter sessions by Walsh.

Prior to the general annual licensing meeting held on August 24, 1891, the superintendent of police of the district gave Greaves due notice of his intention to oppose the renewal of the licence granted to Greaves in 1890; the notice was sent by post as provided by s. 70 of the Licensing Act, 1872, addressed to Greaves at the Prince Albert Inn, but was returned by the Post Office to the sender. Neither at the general licensing meeting on August 24, 1891, nor at the adjournment thereof on September 9, 1891, was any application for a renewal of the licence made by or on behalf of Greaves; but at that adjourned meeting John Keane applied that a licence might be granted to him in his own name in respect of the premises; the application was opposed by the superintendent of police, and the grant of a licence was refused on the ground that the house had been closed for over twelve months, and that the licence was not required, no evidence of its being required having on that occasion been produced. No appeal was made by Keane to quarter sessions. The licence held by Greaves expired on October 10, 1891, by effluxion of time.

On February 11, 1892, Baldwin, the present appellant, gave notice of his intention to apply at the next special sessions for a licence for the premises, on the ground that Greaves had removed from or yielded up possession of the premises, and had wilfully omitted or neglected to apply for a renewal of the licence at the general annual licensing meeting; and on March 4, 1892, the appellant applied at a special sessions that a licence

might be granted him under 9 Geo. 4, c. 61, s. 14 (1), on the grounds set forth in his notice, he having entered into an agreement with the owner to take the premises, and having become tenant or occupier of the house. Evidence on oath was then given on both sides as to whether a licence for the house was required for the accommodation of the neighbourhood.

It was contended on behalf of the appellant that, notwithstanding the fact that Greaves removed from and yielded up possession of the house in December, 1890, and did not apply for a renewal of his licence at the annual licensing meeting in 1891, and the fact that Keane, the new tenant and occupier of the premises, applied at that meeting for the renewal of the licence to himself and was refused (not on any ground personal to Keane, but on the ground that the house was not required), and the fact that Greaves' licence expired on October 10, 1891, yet the appellant, as being the then new tenant and occupier of the house, was within his rights in applying at a special session in March, 1892, for a licence under 9 Geo. 4, c. 61, s. 14. The cases of *Reg.* v. *Justices of Liverpool* (2), *Reg.* v. *Justices of Market Bosworth* (3), and *Reg.* v. *Justices of Upper Goldcross* (4) were cited in support of the appellant's application. The justices considered the appellant's contention to be inconsistent, inasmuch as it would in such case be competent for an application to be made for a licence by a succession of tenants at any and each of the special licensing sessions held during the year succeeding the expiration of any licence the renewal of which had been refused at an annual licensing meeting, thus making the special sessions practically

(1) By 9 Geo. 4, c. 61, s. 14: "If any person duly licensed under this Act shall before the expiration of such licence . . . . remove from or yield up the possession of the house specified in such licence; or if the occupier of any such house, being about to quit the same, shall have wilfully omitted or shall have neglected to apply, at the general annual licensing meeting or at any adjournment thereof, for a licence to continue to sell exciseable liquors by retail, to be drunk or consumed in such house, it shall be lawful for the justices assembled as aforesaid at a special session . . . . to grant to . . . . any new tenant or occupier of any house having so become unoccupied . . . . a licence to sell exciseable liquors by retail, to be drunk or consumed in such house, or the premises thereunto belonging."

(2) 11 Q. B. D. 638.

(3) 56 L. J. (M.C.) 96.

(4) 62 L. T. (N.S.) 112.

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a court of appeal from the licensing justices who refused the renewal of a licence. The justices were further of opinion that the case differed in its facts from those above cited, and, having regard to the case of *Simkin* v. *Justices of Birmingham* (1), which was approved by the Court of Appeal in *Reg.* v. *Justices of Liverpool* (2), they did not consider it conclusive that they had jurisdiction to grant the licence applied for by the appellant. They were prepared, however, to grant the licence if they were wrong in holding that they had no jurisdiction to grant it.

The question for the opinion of the Court was whether the justices had jurisdiction to grant to the appellant a licence under 9 Geo. 4, c. 61, s. 14, under the circumstances set forth in the case.

May 5. *J. Paterson*, for the appellant. The justices had jurisdiction to grant the licence; the appellant is clearly within the provisions of s. 14, which points out the circumstances under which such an application may be made. There is no limitation in the section as to the time of applying for a licence, but only as to the circumstances necessary to give jurisdiction to the justices. It is true that the previous applications of Walsh and Keane had been refused; but that does not prevent an application by another new tenant; it does not amount to res judicata: *Reg.* v. *Justices of Upper Goldcross* (3); *Reg.* v. *Powell* (4); *Reg.* v. *Thomas.* (5) The circumstances are almost identical with those in *Reg.* v. *Justices of Liverpool* (2), the effect of which decision was that where a licence-holder surrendered and left the premises during the currency of his licence, the justices could entertain applications by any number of succeeding tenants who might come into possession during the licensing year next after the expiration of the current licence.

No counsel appeared for the respondents.

Cur. adv. vult.

May 16. POLLOCK, B. This is an appeal from a decision of justices declining to grant an application for a licence under

(1) Law Rep. 7 Q. B. 482.
(2) 11 Q. B. D. 638.
(3) 62 L. T. (N.S.) 112.
(4) [1891] 2 Q. B. 693.
(5) [1892] 1 Q. B. 426.

9 Geo. 4, c. 61, s. 14. The facts are in substance as follows:— In January, 1889, the licence was transferred to one Greaves, and it was renewed to him at the general annual licensing meeting in that year. The house was in 1890 closed by Greaves, who, however, remained in possession. In May, 1891, there was an application for a transfer of the licence to Walsh, which was refused on grounds upon which it is unnecessary to enter, and from that refusal there was no appeal. On September 9, 1891, an application was made by another tenant for a grant of a licence, but was refused. On February 11, 1892, the licence having then expired, notice was given by Baldwin of his intention to apply for a licence, which application was heard on March 4. Upon the hearing several cases were cited, especially that of *Reg.* v. *Justices of Liverpool* (1), and the justices came to the conclusion that it would be inconsistent to grant the licence to Baldwin, because otherwise it would be competent for a series of tenants in succession to apply until one of them obtained it; they held accordingly that they had no power to grant the licence, saying, however, that they would grant the licence if the Court thought they were wrong in holding that they had no jurisdiction; and they have stated this case, which raises the question whether they had any jurisdiction to grant the licence.

The case which influenced the justices in their decision was that of *Reg.* v. *Justices of Liverpool.* (1) The first thing to be observed in this part of the case is that there was no personal objection to Baldwin, the appellant, the only question being whether he was in time; upon this we had not much doubt, but as the case was not argued on behalf of the respondents we took a short time to consider our judgment. I have come to the conclusion that the justices were wrong, and that the decision in *Reg.* v. *Justices of Liverpool* (1), when carefully looked at, is really in favour of the appellant. I need only call attention to the language of the Master of the Rolls at p. 646: "It seems to me that the present case is within the section; that there is no limitation of time which deprived the justices of their jurisdiction, and that they therefore had jurisdiction to admit the appellant to a renewed licence." In my opinion, that decision

(1) 11 Q. B. D. 638.

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practically governs this case. Other cases were indeed cited before the justices; but they do not interfere with that decision or curtail their jurisdiction. In *Reg.* v. *Thomas* (1) it was held, under somewhat similar circumstances to the present, that the justices had jurisdiction to grant a licence. In *Reg.* v. *Powell* (2) a new tenant applied twice under s. 14, but did not apply at the adjourned general meeting for a renewal; and it was held that, inasmuch as he was the same person who had previously applied under s. 14, the second application, which was practically for a renewal, could not be properly made. That is obviously a very different state of things to the present. In *Simpkin* v. *Justices of Birmingham* (3) it was held that where a tenant continued in possession after the expiry of the licence, and did not apply for a renewal, the case was not within 9 Geo. 4, c. 61, s. 14, for the licence-holder had not gone out during the currency of the licence; the real object of the section being to protect the rights of the landlord in case of the death, illness, departure, &c., of the tenant. This appeal must, therefore, in my opinion, be allowed.

VAUGHAN WILLIAMS, J. I am of the same opinion, though I cannot help saying that if I had approached the section in the absence of authority I should have been inclined to come to a different conclusion. It seems plain that the object of s. 14 is to enable the landlord or owner to make what I may for shortness call an application for an interim licence, in cases where such a cause as illness or death has prevented the occupier from making the ordinary application at special sessions or the general annual licensing meeting, or where he has wilfully neglected to make it. If the language of the section is looked at, those are the events mentioned in the beginning of the section as giving rise to these applications; they cover cases where the occupier has, either through misfortune or perverseness, failed to make an application at brewster sessions. In such cases the Act of Parliament gives an opportunity to the owner or landlord of procuring a new tenant who may get a licence, which it is

(1) [1892] 1 Q. B. 426. (2) [1891] 2 Q. B. 693.
(3) Law Rep. 7 Q. B. 482.

specially provided shall enure only till October 10 following. Now, in the present case, the licence was renewed in the ordinary course at Michaelmas, 1890; and, in May, 1891, an unsuccessful application under s. 14 was made to special sessions. It is true that the authorities establish that the mere fact that one man has applied for a licence under 9 Geo. 4, c. 61, s. 14, is no reason why another person nominated by the landlord should not make a fresh application; but the peculiarity of this case is that a later application was made to the adjourned general annual licensing meeting in September, 1891. The question then arises whether, after that later application, any one can take advantage of the provisions of s. 14; for if it be true that the object of that section is to provide for cases of failure on the tenant's part, we have here a general annual licensing meeting, held subsequently to his default, at which an application was made and refused; the hardship which led to the passing of the section has, therefore, ceased to exist. In the absence of authority, therefore, I should have come to the conclusion that no further application could be made after the unsuccessful application to the general annual licensing meeting; as, however, I have failed to find in any case a trace of any such distinction, I cannot suppose it to be a good one. I am, therefore, not prepared to dissent from the judgment of my learned brother.

Appeal allowed.

Solicitors for appellant: *Maitlands, Peckham & Co.*

W. J. B.

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[IN THE COURT OF APPEAL.]

PRICE, APPELLANT; JAMES, RESPONDENT.

Licensing Acts—Licence, application for renewal of—Notice of intention to oppose—Person holding temporary Authority to carry on Business under 5 & 6 *Vict. c.* 44, *s.* 1—*Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 42—*Special Case stated by Licensing Justices—Proper party to be Respondent—Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 33.

Sect. 42 of the Licensing Act, 1872, provides that, "where a licensed person applies for the renewal of his licence . . . . the justices shall not entertain any objection to the renewal of such licence, or take any evidence with respect to the renewal thereof, unless written notice of an intention to oppose the renewal of such licence has been served on such holder not less than seven days before the commencement of the general annual licensing meeting."

The occupier of licensed premises being about to leave the same, an interim authority was granted to the appellant under 5 & 6 Vict. c. 44, s. 1, to carry on the business until the next special session for transfer of licences. Such session and the general annual licensing meeting being held simultaneously, the appellant made applications thereat for a transfer of the licence under 9 Geo. 4, c. 61, s. 14, and also for a renewal of the licence. Both applications were refused by the justices, because they were not satisfied as to the appellant's good character. No notice of intention to oppose the renewal of the licence had been served upon the appellant:—

Held, that the appellant was not a "licensed person" applying for a renewal of "his" licence within the meaning of the above-mentioned section, and therefore was not entitled to the notice therein mentioned:

Held, also, that where a case was stated under 42 & 43 Vict. c. 49, s. 33, in reference to the refusal of a licence, the superintendent of police of the division, who had appeared to oppose the licence before the justices, and to whom notice in writing of the appeal had been given by the appellant, in accordance with 20 & 21 Vict. c. 43, s. 2, was rightly constituted respondent.

APPEAL from the judgment of the Queen's Bench Division upon a special case stated by licensing justices under the Summary Jurisdiction Acts.

At the general annual licensing meeting for the division of Pontypool, in the county of Monmouth, held on August 22, 1891, which happened also to be the day appointed for the holding of special sessions for the transfer of licences, the appellant applied to the justices for the transfer of the licence of the Britannia Inn, Pontnewynydd, in the said division, until the expiration of the current licensing year under 9 Geo. 4, c. 61,

s. 14, the former tenant having given up possession thereof; and also for the renewal of such licence for the ensuing year. The applications were opposed by the respondent, who was superintendent of police for the division. The applications were refused, subject to the case, the facts stated in which were in substance as follows:

The Britannia Inn was a beerhouse, licensed from a date prior to May 1, 1869, for the sale by retail of beer to be consumed on or off the premises, and the licence had been renewed ever since down to October 10, 1891. On April 18, 1891, one Mason, the occupier and licence-holder of the inn, was convicted of permitting gaming on the premises, and his licence indorsed. On June 20, 1891, he applied for and obtained at petty sessions a temporary authority to the appellant, under 5 & 6 Vict. c. 44, s. 1, to carry on the business until the next special sessions. Mason did not, by August 8, 1891, or at all, give notice of his intention to apply to transfer the licence to the appellant as required by 35 & 36 Vict. c. 94, s. 40, sub-s. 2. On August 22, 1891, counsel, on behalf of the appellant, applied to the justices for the transfer or continuance to him of the existing licence until the expiration of the current licensing year (which would expire on October 10, 1891), under 9 Geo. 4, c. 61, s. 14, stating that the application was made under that section, because the notice above-mentioned had not been given by Mason. No notice of this application had been given to the respondent by the appellant, pursuant to 32 & 33 Vict. c. 27, s. 7, and 33 & 34 Vict. c. 29, s. 4, or at all. It was proved before the justices that a notice of objection, dated August 12, 1891, was on the same date duly served by the respondent on Mason, on the grounds of (1) misconduct in the house, (2) that the premises were inferior, (3) that the licence was not required in the locality. It was proved on behalf of the respondent that, prior to June 20, 1891, there had been misconduct in carrying on the house, illegal Sunday trading, that the house had been open during closing hours, and the conviction before referred to and a previous conviction of a former tenant of the house in 1888 were proved. Counsel objected to the receipt of this evidence and to all evidence outside the four grounds mentioned in s. 8 of 32 & 33

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Vict. c. 27. The appellant was called, on his own behalf, and produced certain letters as to his character with which the justices were not satisfied, and which they refused to accept as evidence. No witnesses as to the appellant's good character were called. The justices refused the application for a transfer on the ground that they were not satisfied as to the appellant's good character. The appellant then applied for a renewal of the licence for the year ending October 10, 1891, i.e., for a licence from that date till October 10, 1892. No further evidence was called on behalf of the appellant, both the applications being heard at the same time, and the same evidence being applicable to both. The justices refused this application also, on the ground that the appellant had failed to produce satisfactory evidence of good character. No notice of objection had been served on the appellant. The question for the Court was whether the appellant was entitled to notice of objection under 35 & 36 Vict. c. 94, s. 42, sub-s. 2. (1)

(1) Various other questions were submitted by the case, with reference to the first of the appellant's applications; but on the argument, the appellant's counsel stated that they could not argue that the justices were wrong in refusing the first application for the transfer of the licence, and that the only question to be argued was that mentioned above.

The 5 & 6 Vict. c. 44, s. 1, in substance empowers justices sitting in petty sessions at a time when no special sessions shall be holden, in those cases where special sessions are empowered by 9 Geo. 4. c. 61, to transfer or grant licences, by indorsement on any licence granted at any general licensing meeting, to authorize any person not disqualified by 9 Geo. 4, c. 61, to whom it shall be proposed to transfer or grant any such licence, to use, exercise, and carry on the business of a licensed victualler at the same house and on the same premises, and there to sell such exciseable liquors as might theretofore have been lawfully sold and retailed therein; and provides that the authority so granted shall continue and be in force until the then next ensuing special session, which shall be holden for the division within which such house and premises shall be situated and no longer; at which special session the justices upon application made to them pursuant to the said Act, touching any transfer or grant of licence to the party to whom such authority shall have been so given, shall hear and dispose of such application: "provided that any person or persons who shall be authorized under the provisions of this Act to continue to carry on the business of a licensed victualler shall after the obtaining such authority, and so long as the same shall continue in force, be subject to all the powers, regulations, proceedings, penalties, and provisions declared by or contained in any Act or Acts in force touching the regulation, government, or con-

The Divisional Court (Wright and Collins, JJ.), gave judgment for the respondent.

Jelf, Q.C., and *James Paterson*, (*Glascodine*, with them), for the appellant. The appellant was a licensed person applying for a renewal of his licence within the meaning of the 42nd section of the Licensing Act, 1872. The proviso to s. 1 of 5 & 6 Vict. c. 44, places him in the same position as a licensed person. If he were not a licensed person, he would come within the 3rd section of the Licensing Act, 1872, which forbids the sale of intoxicating liquors by a person not duly licensed. The case of *Reg.* v. *Justices of Liverpool* (1), which altered what had been the previous practice and understanding of the law on this subject, shews that any person, who comes into the premises during the currency of a licence, is a person entitled to apply for a "renewal" of the licence at the general annual licensing meeting within the meaning of 9 Geo. 4, c. 61, s. 14. Therefore the appellant was entitled to apply for a renewal of the licence which existed in respect of the premises, and by virtue of the authority given to him under 5 & 6 Vict. c. 44, s. 1, he was in the position of a licensed person. He was consequently entitled under s. 42 of the Licensing Act, 1872, to written notice of intention to oppose the renewal of the licence.

[LORD ESHER, M.R. In the case of *Reg.* v. *Justices of Liverpool* (1), no doubt the term "renewal" was used; but it is obvious that what was meant was a new grant of a licence in respect of premises previously licensed.

BOWEN, L.J. The words of the 42nd section are not "renewal of a licence" but "renewal of his licence." Unless the authority

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trol of licensed keepers of inns, alehouses, and victualling houses, in like manner as if the same had been repealed and re-enacted."

By the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 42, it is provided that, "where a licensed person applies for the renewal of his licence, the following provisions shall have effect. (2) The justices shall not entertain any objection to the renewal of such licence, or take any evidence with respect to the renewal thereof, unless written notice of an intention to oppose the renewal of such licence has been served on such holder not less than seven days before the commencement of the general annual licensing meeting," &c.

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given to the appellant under 5 & 6 Vict. c. 44, s. 1, was a licence, the appellant never had a licence.]

The word "his" was not intended to import that the licence must necessarily have been the appellant's. The section only means that the applicant must be in the position of a licensed person applying for the renewal of a licence which had previously existed in respect of the premises. [They also cited on this point *Reg.* v. *Powell* (1); *Reg* v. *Thomas.* (2)]

Secondly, the proper person has not been made respondent in this case. The licensing justices are the only parties who can properly be made respondents. They are the respondents in the case of an appeal to quarter sessions. There is really no "other party" within the meaning of 20 & 21 Vict. c. 43, s. 2. In cases within that Act, the proceedings being on information or complaint, there would always be two parties, the complainant, or informant, and the defendant. But it is not so in licensing cases. Anybody and any number of persons may object to the granting of the licence before the justices, but it cannot be that such persons are all of them to be respondents.

[LORD ESHER, M.R. This point can only be material on the question of costs.]

Poland, Q.C., and *W. Daniell*, for the respondent, were stopped on the first point. The 42 & 43 Vict. c. 49, s. 33, under which this case is stated, incorporates the 20 & 21 Vict. c. 43. The 2nd section of that Act provides that the appellant shall within three days after receiving the case "transmit the same to the Court, first giving notice in writing of such appeal, with a copy of the case so stated and signed, to the other party to the proceeding in which the determination was given, hereinafter called the respondent." Therefore the legislature clearly contemplates some party being made respondent. In this case the only party who could be made respondent was the superintendent of police, who in fact appeared and opposed the application for renewal of the licence before the justices, and to whom the appellant gave notice in writing of the appeal as required by 20 & 21 Vict. c. 43, s. 2. Obviously the justices cannot be made respondents in a case to be stated by themselves. It is the common practice

(1) [1891] 2 Q. B. 693. (2) [1892] 1 Q. B. 426.

in such cases for the superintendent of police to appear and oppose the licence.

LORD ESHER, M.R. In this case a man named Mason was the occupier of the premises and the owner of the licence. He had been convicted of some misconduct, and had made up his mind to leave the premises. The appellant became occupier of them, no doubt by arrangement with Mason, and on the terms that the licence should be transferred to him. When the licensing day came he made two independent applications to the magistrates. One was that the licence for the current year should be transferred to him. That application was made under 9 Geo. 4, c. 61, s. 14. I may here observe that the term "renewal" used in the judgment in *Reg.* v. *Justices of Liverpool* (1) with reference to this section appears to me not an inapt term to use in speaking of an application for the continuance to the occupier of premises of the licence held by a former occupier, though no doubt the term "grant" would have been the strictly correct legal term, and is the term used in the section. I do not think, however, that it would be right to call such a grant a renewal of "his," i.e., the applicant's licence. It has been suggested that the decision in *Reg.* v. *Justices of Liverpool* (1) entirely altered the previously established law and practice on this subject, but I do not think that it did anything of the kind. The magistrates refused the application under 9 Geo. 4, c. 61, s. 14, as they had by law a right to do, on the ground that the appellant did not support it by producing the necessary vouchers as to character. Therefore, so far as that application is concerned, it was duly entertained and adjudicated upon; and it failed. The appellant then fell back on his other application, which he claims to treat as an application for renewal of his licence within the meaning of s. 42 of the Licensing Act, 1872. The application, to come under that section, must be an application for a renewal, not of a licence granted to Mason or anybody else, but of "his," i.e., the appellant's licence. The words are as distinct as possible. They are "where 'a licensed person' applies for the renewal of 'his' licence." Therefore, the first step which the appellant has

(1) 11 Q. B. D. 638.

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to take is to shew that he was a licensed person, and then he must shew that it was "his" licence which he sought to have renewed. Unless that is shewn he cannot bring himself within the section. Here, in my opinion, he had no licence, and therefore he was not a licensed person, and could not apply for a renewal of his licence. It was argued that, although he had not a licence in the proper sense of the term, he had what was equivalent to a licence, and what constituted a licence within the meaning of s. 42, by virtue of the Act 5 & 6 Vict. c. 44. That Act gives power to magistrates to grant that which, I believe, is frequently termed by those who have to deal with such matters an interim licence, but which is not really a licence at all, and is clearly distinguished from a licence by the language of the Act. The Act speaks of it as an authority to use, exercise, and carry on the business of a licensed victualler on the premises; and the authority so granted is to be in force only till the next ensuing special sessions for the transfer of licences. It is not a licence in the sense in which that term is used by the Licensing Acts. It is not granted at licensing sessions, and it is only to last till the next special sessions. It is only a leave or authority to a person to carry on the business till he has an opportunity at the next special sessions to apply for a licence to himself. The appellant made that application in the first place, acting under the 5 & 6 Vict. c. 44, s. 1, which incorporates the Act 9 Geo. 4, c. 61, and his application was entertained and properly adjudicated upon. With regard to the second application, directly it appears that the appellant had no licence at all, it is clear that the application is not within s. 42 of the Licensing Act, 1872. The decisions in the cases of *Reg.* v. *Justices of Liverpool* (1); *Reg.* v. *Powell* (2); and *Reg.* v. *Thomas* (3), have absolutely nothing to do with the present case.

The other question raised was who, where a case is stated by the licensing magistrates, is the proper party to be respondent. There is no doubt that it has always been the rule under the Licensing Acts for the magistrates to allow any person interested in the welfare of the neighbourhood to appear as an objector to

(1) 11 Q. B. D. 638. (2) [1891] 2 Q. B. 693.
(3) [1892] 1 Q. B. 426.

the granting of a licence to the person applying for one, and to state his objections; and I think a person who had so objected would be properly made respondent, if he chose, and, if so made respondent, would be liable to pay costs if unsuccessful. Here the objector was the superintendent of police, who is generally the objector in such cases. He was made the respondent in the case, and he must now be treated as properly made respondent, because the appellant has given notice in writing of the appeal to him. For these reasons I think that the appeal should be dismissed with costs.

BOWEN, L.J. I am of the same opinion. The first application made by the appellant was under 9 Geo. 4, c. 61, s. 14. The effect of it, if successful, would have been to enable him to continue in Mason's shoes by virtue of a grant of a licence. It is immaterial, as it appears to me, for the purposes of this case, whether one considers such a grant as a transfer or a renewal of an old licence. The justices refused the application, and it is not contended that they were wrong in so doing. The appellant, having failed in his first application, then fell back on a second. His object was to escape from the objections made to the first application, on the ground that the second application was within s. 42 of the Licensing Act, 1872, because it was an application by a licensed person for a renewal of "*his*" licence. If that had been the case, the appellant would have escaped from the objections taken, because no written notice of the intention to oppose the renewal of the licence had been served on him as required by the section. On consideration of the terms of the section, the magistrates thought that the appellant was not a licensed person within the meaning of it, nor applying for the renewal of a licence of his own. He was, in fact, only the holder of a temporary or interim authority under 5 & 6 Vict. c. 44, s. 1, obtained shortly before, which authorized him to use, exercise, and carry on the business till the next special sessions, and which expired as soon as the day of holding them arrived. It is obvious that this appeal must fail, unless the appellant can shew that he was "a licensed person" applying for a renewal of "his" licence. By way of a step towards shewing this, it was contended that the

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appellant's second application was an application for the "renewal" of a licence. It seems to me doubtful whether that was so. But we were asked to consider the case of *Reg.* v. *Justices of Liverpool* (1), and other cases, in which applications under the statute 9 Geo. 4, c. 61, s. 14, had been spoken of by the Courts as applications for transfer or renewal of licences. It was contended upon those cases that this was an application for a renewal of a licence, because it was an application for a grant of a licence by an occupier of premises which had been previously licensed. But this argument avails the appellant nothing, unless he can shew that he was a "licensed person" applying for a renewal of "his" licence. That he was not so seems to me to follow both from the terms of the 1st section of 5 & 6 Vict. c. 44, under which the temporary authority was given, and from the words of the definition contained in s. 74 of the Licensing Act, 1872. By the latter section "'licence' means a licence for the sale of intoxicating liquors granted by justices in pursuance of the Intoxicating Liquor Licensing Act, 1828, &c." The appellant was not holding a licence of that sort. He merely had the temporary authority provided for by 5 & 6 Vict. c. 44, s. 1. It was said that he was a licensed person, because of certain obligations thrown on him by the proviso to that section, and also because, unless he were to be treated as a licensed person, he would come within the penal enactment of s. 3 of the Licensing Act, 1872. The answer to this latter contention seems to me to be found in the section under which the temporary authority is created. A person who receives that authority is entitled to carry on the business of a licensed victualler on the premises, and, so far as he is merely doing that, he becomes a licensed person so far as is necessary to take him out of the provisions of s. 3. But the 1st section of 5 & 6 Vict. c. 44, draws a clear line between the right conferred and the liabilities imposed on the holder of the authority. The right conferred is simply to carry on the business of a licensed victualler on the premises. The person so authorized is to be subject to all the powers, regulations, penalties, and provisions declared by or contained in any Act or Acts touching the regulation, government, or control of licensed

(1) 11 Q. B. D. 638.

keepers of inns, &c. Therefore he has imposed upon him the duties and obligations of a licensed person, but he does not become for all purposes a licensed person; he does not obtain a licensed person's rights or his licence. The argument that he is not a licensed person under s. 1 of 5 & 6 Vict. c. 44, does not conclude the matter. In order to get the benefit of s. 42 of the Licensing Act, 1872, the appellant must be a licensed person applying for a renewal of "his" licence. The counsel for the appellant put forward the somewhat startling contention that the word "his" in the section was unimportant. Now the object of the section appears to me to be to relieve a person applying for a renewal of *his* licence from certain obligations, which in his case were thought to be oppressive, and it does not follow that the same considerations would apply where the application is merely for renewal of *a* licence. The definition in the interpretation clause seems to me to make the matter clear, for it speaks of "renewal of *a* licence" as meaning a licence granted at a general annual licensing meeting by way of renewal. Therefore, although the Act uses in some sections the term "renewal of *a* licence," in this section its terms are confined to cases where a man is applying for a renewal of his own licence. It seems to me that, when that is perceived, this point becomes unarguable.

Then there is the second question, viz., whether the right person has been made respondent. It would be a remarkable position, if there were to be a special case and nobody could be made respondent. The justices obviously ought not to be respondents in a case which is to be stated by them. If they cannot be respondents, who can be but the superintendent of police, who, for the purpose of certain enactments relating to licensing, is expressly given a locus standi? I should say that any person interested, and who had been heard before the justices in opposition to the granting of the licence, might be a respondent. The matter is not left altogether at large to be considered by the light of reason. By the Summary Jurisdiction Act, 1879, under which the case is stated, the provisions of 20 & 21 Vict. c. 43, are incorporated. It is perfectly true that that Act itself only applied to special cases, where the proceedings were between complainants or prosecutors on the one side, and

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defendants or accused persons on the other; but to argue that an incorporated Act is only to apply to cases to which the incorporated Act would itself have applied is to destroy the object of the incorporation altogether. It is obvious that, as under 20 & 21 Vict. c. 43, there must have been a respondent, so under the Summary Jurisdiction Act there must be a respondent, and such respondent must be the other party to the proceeding whoever he was. The superintendent of police in this case was the party who objected, and he is the natural and usual person to object in such cases. For these reasons I think the appeal must be dismissed.

KAY, L.J. In this case a special case has been stated, the facts of which may be summarized as follows:—In 1891, one Mason was the occupier of these premises, and held the licence which would expire on October 10, 1891. He was convicted of an offence and his licence was indorsed. In June, 1891, the appellant obtained a temporary authority to carry on the business under 5 & 6 Vict. c. 44, s. 1. That authority would last only until the next special sessions for the transfer of licences, which took place on August 22, and therefore it would not last so long as Mason's licence, but would expire while that was still current. Mason did not give the proper notices of his intention to transfer the licence. On August 22, the appellant applied under 9 Geo. 4, c. 61, s. 14, for a transfer of the licence and its continuance to him till the expiration of the current licensing year, which would occur on October 10. That application was refused, and the appellant does not argue that the refusal was wrong. The appellant then made another application. He applied for the renewal of the licence for the year from October 10, 1891, to October 10, 1892. That application was also refused. The appellant says that it was wrong to refuse it, because the written notice of objection mentioned in 35 & 36 Vict. c. 94, s. 42, was not given to him. It appears to me that the smallest attention to the enactments on the subject shews that this section does not apply to the case. The appellant never had a licence, unless the temporary authority which was to expire on August 22, was equivalent to a licence within the meaning of

the section. It is clear that it was not. The section speaks of a "licensed person" applying for a renewal of "his" licence, and, unless the appellant could shew that he was such a person, he was not entitled to notice of objection. I think that no one could read the 1st section of 5 & 6 Vict. c. 44, without seeing that the authority there given to carry on the business for a limited period is clearly distinguished from a licence. It is not a licence, but a temporary authority to carry on business while a licence to another person is still in existence. It might be a sufficient answer to the argument for the appellant to point out that, if it is correct, it involves the proposition that there were two licences in existence at the same time, in respect of these premises, one to Mason, which extended till October 10, and one to the appellant, which extended till August 22. Therefore, in my opinion, it is clear that the appellant was not entitled to notice of objection under the 42nd section. That is an answer to the contention made on his behalf that the justices were wrong in refusing his application on the ground that such notice had not been given. The cases of *Reg.* v. *Justices of Liverpool* (1), and *Reg.* v. *Powell* (2), seem to me to have nothing to do with the present point. All that was decided in the first of these cases was, that the person in occupation of the premises at the time of the general licensing sessions was a person who came within the terms of 9 Geo. 4, c. 61, s. 14, and was entitled to apply for the grant of a licence to himself from the expiration of the existing licence, which might for the purpose of the argument in that case be called a renewal of the licence; not a renewal of the licence of the party applying, but a renewal to him of a previously existing licence, which had not been transferred to him. In *Reg.* v. *Powell* (2), the case of *Reg.* v. *Justices of Liverpool* (1) was followed, and all that was decided there was that, where the occupier, having obtained at a special transfer sessions a licence under 9 Geo. 4, c. 61, s. 14, for the year ending October 10, 1890, neglected to apply for a renewal of the licence at the next general annual licensing meeting, he could not at another special transfer session apply for the grant to himself of a licence for that year.

(1) 11 Q. B. D. 638. (2) [1891] 2 Q. B. 693.

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With regard to the question as to the proper person to be made respondent, I entirely agree with the Master of the Rolls, and Bowen, L.J. It seems to be absurd to say, that where the justices have to state a case, there can be no respondent, unless the justices make themselves respondents. It would be most inconvenient if that were the law. For the reasons given, which I will not repeat, I think it clear that some other person must be the person to be made respondent. There may be a difficulty where a number of persons object to the grant of a renewed licence. I should say that the magistrates in such a case would have power to choose some one of such persons to be respondent, and that it is not obligatory upon them to make all of the objectors respondents.

Appeal dismissed.

Solicitors for appellant: *Few & Co., for Bythway & Son, Pontypool.*

Solicitors for respondent: *Thomas White & Sons, for Gustard, Newport.*

E. L.

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[IN THE COURT OF APPEAL.]

IN RE H. A. GREY.

Solicitor—Breach of Duty—Failure to Pay over Money to Client—Judgment recovered by Client—Disciplinary Jurisdiction of Court—Summary Order for Payment.

Where a solicitor has committed a breach of professional duty in failing to pay over money received by him for his client, the fact that the client has brought an action against him and recovered judgment for the money does not take away the disciplinary jurisdiction of the Court summarily to order payment of the money to the client.

In re Corbet Davies (15 W. R. 46; 15 Law Times, 161) not followed.

APPEAL from the decision of a Divisional Court (Grantham and Charles, JJ.), refusing to make an order against a solicitor for payment of a sum of money within four days.

The facts were as follows: The appellant retained the solicitor to (inter alia) bring an action for goods sold and delivered on his behalf. Such action being brought, judgment therein was recovered by the appellant for the amount of 268*l.* 17*s.* 9*d.*, which

amount was received by the solicitor under the judgment. He claimed to retain the amount so received by him in respect of a bill of costs of greater amount delivered by him to the appellant. The appellant, however, alleged that he was not indebted in respect of the full amount of the costs claimed, on the ground that a special arrangement had been made between him and the solicitor that the latter should only charge costs out of pocket and a commission of 5 per cent. on amounts recovered; and that, giving credit to the solicitor for such costs and commission, a balance of 156*l.* remained due from him. The appellant brought an action against the solicitor to recover such balance. The solicitor counter-claimed the amount of his bill of costs. The appellant, in his reply, set up the special arrangement. The jury found a verdict in favour of the appellant for 156*l.*, and judgment was entered thereon. Execution by fi. fa. was issued on the judgment, but proved ineffective, the judgment debtor having two days before the trial executed a bill of sale of all his effects to secure a loan of 250*l.* and interest. He stated in an affidavit filed by him that the bill of sale was given in respect of a loan, which had been hastily raised for a pressing matter totally unconnected with the action against him, and was not made either by way of anticipation of the verdict against him, or to defeat any possible execution in such action; but was given quite bonâ fide, and for an entirely different purpose. The appellant applied at chambers for an order that the solicitor should pay over the amount of the judgment debt to him within four days after service of the order; but the application was refused by the master, whose refusal was affirmed on appeal by the judge at chambers. The Divisional Court, on appeal to them, thought that they were bound by authority to hold that, judgment having been recovered for the amount of the debt, they had no jurisdiction to make the order for payment in the exercise of their summary jurisdiction over the solicitor as an officer of the Court. (1)

French, Q.C., and *Avory*, for the appellant. The Divisional Court refused the application on the authority of *In re Corbet*

(1) It appeared that the solicitor had applied for a new trial of the action against him, but the application had been dismissed.

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Davies (1); in which case it seems to have been held that, if the client elects to take his legal remedy by action, and recovers judgment, the disciplinary jurisdiction of the Court to make an order summarily for payment of the money is gone, because the original debt is merged in the judgment debt, and the judgment debt is not due from the solicitor as such. But it is submitted that that decision cannot stand after the decision of the Court of Appeal in *In re Freston* (2) and *In re Dudley*. (3) Those decisions shew that the disciplinary jurisdiction of the Court to enforce performance by its officers of their duty, is quite independent of the legal right of the client, and cannot be affected by an alteration of such right.

Beddall, for the solicitor. It is not suggested that the fact that judgment has been recovered for the amount takes away the disciplinary jurisdiction of the Court. If there really had been dishonest conduct by the solicitor, the Court would still have jurisdiction on the application of the client to suspend him or strike him off the rolls, or to call upon him to answer the matter of an affidavit. If an application of that kind were made the Court would order an inquiry before a master. In such inquiry, the question would arise as to the existence of the special arrangement, which the solicitor denies, and which he is, and always has been, willing to have inquired into in that way. The power to make a summary order on a solicitor for payment of money only exists where he owes money in his character as a solicitor. The client having elected to treat the debt as an ordinary debt, and having recovered judgment, the original debt is merged, and the solicitor does not owe the judgment debt in his character as a solicitor. The client has abundant remedies on the judgment. He can apply for a commitment order under the Debtors Act, 1869, or take out a debtor summons. Having elected to take civil proceedings, in which he has sufficient remedies, it is oppressive that he should then have recourse to the disciplinary jurisdiction of the Court.

[He cited *In re Ball.* (4)]

French, Q.C., was not called on to reply.

(1) 15 W. R. 46; 15 L. T. 161.
(2) 11 Q. B. D. 545.
(3) 12 Q. B. D. 44.
(4) Law Rep. 8 C. P. 104.

LORD ESHER, M.R. It seems to me that the true way of dealing with this case is to deal with it according to the principle which was laid down by this Court in *In re Freston* (1), and recognised and approved of in *In re Dudley*. (2) The principle so laid down is that the Court has a punitive and disciplinary jurisdiction over solicitors, as being officers of the Court, which is exercised, not for the purpose of enforcing legal rights, but for the purpose of enforcing honourable conduct on the part of the Court's own officers. That power of the Court is quite distinct from any legal rights or remedies of the parties, and cannot, therefore, be affected by anything which affects the strict legal rights of the parties. Such was the principle laid down in the cases to which I have referred, and which were decisions of the Court of Appeal, and therefore are binding on us till overruled by the House of Lords. So, if a solicitor obtains money by process of law for his client, quite irrespective of any legal liability which may be enforced against him by the client, he is bound, in performance of his duty as a solicitor, to hand it over to the client, unless he has a valid claim against it. If he spends it, or if, still having it, he refuses to hand it over, he commits an offence as an officer of the Court, which offence has nothing to do with any legal right or remedy of the client. Here the solicitor does not deny that he received this money, but he sets up a claim in respect of it, which, if valid, would have relieved him from the charge of a breach of his duty as solicitor. It has been decided against him by a jury that he had no valid claim to a large part of it, and, if the finding of the jury, which, I think, we cannot now question, is true, it follows, from such finding, that in keeping this money he did that which was contrary to his duty as a solicitor. The client had, no doubt, a legal remedy for recovery of the money, viz., by an action for money had and received. But the two things, the breach by the solicitor of his duty as such, and the legal right of the client, are quite separate and distinct. The client had a legal right to the money, but the Court has a right to see that its own officer does not act contrary to his duty. The client here brought an action and recovered judgment for the money, which, no

(1) 11 Q. B. D. 545. (2) 12 Q. B. D. 44.

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doubt, changed the client's right. The debt has become a judgment debt, and, so far as the client's legal remedies are concerned, that alters the state of things. He can no longer sue for the original debt, and is relegated to his remedies on the judgment; but the conduct of the solicitor has not been altered. Anything, that may have been a breach of his duty as a solicitor on his part before the judgment, remains a breach of duty after it. Whether, if after the judgment the solicitor had paid the amount, the Court would still have jurisdiction, it is immaterial in this case to consider. I believe it still would have had the same jurisdiction as before, but it would have been exercised in a different way. I think that even then the matter might have been brought before the Court by the Incorporated Law Society; and, if they thought the case a bad case, though the money had been paid, the Court could strike the solicitor off the rolls or suspend him. It was suggested that the right of the client has been altered, and that there are other means of proceeding against the solicitor for any breach of duty which he may have committed; but the fact of there being such other means does not take away the jurisdiction to make the order for payment of the money. Of course, it would not be exercised cumulatively in addition to such other means, but the Court may take whichever course it thinks right.

It appears to me that we can make the order asked for on the ground that the power of the Court which is invoked is a punitive, disciplinary power to prevent breaches of their duty by its officers, quite distinct and separate from the client's legal right, and therefore unaffected by any alteration of such right. It was argued that there were decisions contrary to this view. The case of *In re Corbet Davies* (1) was cited. That case was decided by judges of weighty authority, and I will not deny that on the report it would seem that they thought that the fact of judgment having been recovered for the money took away their jurisdiction to make the order applied for. I do not feel sure that they could have intended to hold that, but, assuming that they did, that case was before the decisions of the Court of Appeal in *In re Freston* (2) and *In re Dudley* (3), and, if the principles laid

(1) 15 W. R. 46; 15 L. T. 161. (2) 11 Q. B. D. 545.
(3) 12 Q. B. D. 44.

down in those cases are inconsistent with the decision in *In re Corbet Davies* (1), that case must be considered to be overruled. There was a case cited—*In re Ball* (2)—which followed a previous case, *In re Robinson.* (3) In those cases it seems to have been held that, where a solicitor has acted as in this case, and the client has taken civil proceedings, and obtained a judgment or order which is equivalent thereto, the Court will not exercise its disciplinary power, whilst such judgment or order stands, and there is nothing to shew that it will prove ineffective. But in neither of those cases does the Court seem to have gone so far as to hold that, if the judgment can be shewn to be ineffective, the Court will not act on the independent disciplinary power which it has. Whether the Court would, after the decisions in *In re Freston* (4) and *In re Dudley* (5), go as far as the Court did in *In re Ball* (2) and *In re Robinson* (3), I am not at present prepared to say; but I do not think those cases are any authority for the proposition that the Court will hold its hand where the judgment is shewn to be ineffective. Here execution was put in and resulted in nothing. If the view taken in those cases was that the mere fact of judgment having been recovered was an answer to the application against the solicitor, notwithstanding that there had been a breach of duty by him, and that the disciplinary power of the Court is independent of the right of the client, I must say I disagree with that view. I doubt whether the power of the Court would be suspended, even if a judgment had been recovered, and it were not known whether it would be effective. I am of opinion that even in that case the Court would, notwithstanding what had happened to the right of the client, have jurisdiction to make an order in the exercise of its disciplinary jurisdiction, and, if so, I know of no limitation with regard to the manner in which it is to be exercised. The matter, in my opinion, is one of discretion to be exercised according to the circumstances of the particular case, in which the Court has to exercise its discretion. I do not say for a moment that the fact that judgment has been recovered by the client is

(1) 15 W. R. 46; 15 L. T. 161.
(2) Law Rep. 8 C. P. 104.
(3) 10 B. & S. 75.
(4) 11 Q. B. D. 545.
(5) 12 Q. B. D. 44.

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not a matter to be taken into serious consideration in such a case. The Court must see that the solicitor is not oppressed. The fact that such a judgment has been recovered is a fact which should cause the Court to pause and consider whether the application against the solicitor is oppressive. The Court would take into account, as it did in *In re Ball* (1), and *In re Robinson* (2), the fact that a judgment had been recovered which might effectively be put in force. Therefore, I do not say that in all cases where there had been a judgment recovered the Court would exercise its disciplinary jurisdiction. In this case the judgment was ineffective, and that because the solicitor was in debt before and gave a bill of sale on his goods. I do not say that the bill of sale was fraudulent; but it had the effect, at any rate, of defeating the right of the client towards whom he had committed a breach of his duty as solicitor. We have, therefore, the fact that the solicitor defeated the execution by giving a bill of sale; and moreover, in his affidavit, he does not state that he has not the means of paying this money, though I do not say, that, if he had no means, it would be any answer to this application. This is only a circumstance which must be taken into consideration with the rest of the circumstances of the case. Under the circumstances of this case I am not satisfied that we shall be oppressing this solicitor by making an order on him to pay this money. To say that he must pay it in four days might be oppressive. The order which I think we ought to make in the exercise of our discretion, and by which we shall not be overruling the discretion of the Divisional Court, for their view was that they had no discretion, and were bound by authority, is that the solicitor must pay the amount due within a month, the effect being that, if he does not so pay it, an application may be made for his attachment. But I think that order must be made on the terms that the client, having elected to apply to the disciplinary jurisdiction of the Court, must from this time forth take no proceedings by writ of execution or otherwise on the judgment in respect of the debt without further order of the Court.

(1) Law Rep. 8 C. P. 104. (2) 10 B. & S. 75.

BOWEN, L.J. I am of the same opinion. The solicitor in this case is in a situation which presents two aspects, involving a double responsibility. He was a debtor, who owed a legal debt. He also owed a duty to his profession, and the Court of Justice whose officer he was, to pay over the money which belonged to his client, and of which he had possession through the confidence placed in him in his professional capacity, and as an officer of the Court. There are in such a case two wholly distinct rights, the right of the client at law to be paid his debt, and his right to apply to the Court as a person whose confidence has been abused by a person who is an officer of the Court, and whom he would not have trusted unless he had been such an officer. In this case the client was met in the first instance by the answer that, so far from there being any professional duty, there was no debt at all; and, as the Court cannot try on motion what the terms of the retainer were, it was necessary that the matter should be decided in the ordinary course, viz., by an action at law, in which the issue would be which of the two stories was true. An action was accordingly brought, and the jury decided by their verdict that the story of the client, not that of the solicitor, was true; and consequently that the money was retained by the solicitor contrary to his duty as a solicitor. An execution was put in on the judgment, but the judgment was not satisfied under circumstances to which I will allude presently. Thereupon the client comes to the Court to ask it to assert its disciplinary authority over its own officer, and compel him to do right by paying this money. The technical answer which is made on behalf of the solicitor, and which might be good enough if only the legal liability were in question, is that such liability has been changed in character by reason of the judgment, and that the debt has now become a judgment debt. But there cannot be an end of the application to this Court on any such ground. The moral duty of the solicitor does not disappear because the legal debt has become a judgment debt. We are sitting now as a tribunal for the enforcement of professional duties. How can the legal doctrine of res judicata apply in such a case? The legal right of the client may be merged in the judgment, but the offence of the solicitor against his professional duty and the Court is not

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purged by the mere fact that the simple contract debt has become a judgment debt. He still remains under the moral obligation to pay over to his client the money which was his client's; and it is none the less his duty to do so, because a judgment has been obtained. If the offence is not purged, how can the jurisdiction of the Court be taken away? We were pressed with the case of *In re Corbet Davies* (1), where the application against the solicitor was refused on the ground that proceedings at law had been taken. There are dicta in that case, which seem to shew that the Court considered it a material circumstance that the debt had been changed into a judgment debt, and was therefore no longer owing from the solicitor in his character of solicitor. I doubt, like the Master of the Rolls, whether the Court did more than point out, in answer to arguments pressed upon it, that the debt, regarded as a legal debt, had changed its character. If the Court meant to go further, which I very much doubt, and to decide what has been suggested, then I must say that I think the judgment cannot be sustained. How can it be material, when the Court is considering the conduct of the solicitor as its officer, that the money is no longer owing as a simple contract but as a judgment debt? If the jurisdiction of the Court still exists, then it seems to me that, the matter being one of discretion, no hard and fast rules can be laid down whereby such discretion would be fettered. It is possible to point out matters as being important to consider in exercising a discretion, or even as being matters, which in nine cases out of ten might govern the exercise of the discretion; but I do not think it can be assumed with regard to a matter of discretion that in previous cases it was intended to lay down absolute rules to fetter its exercise. If so, the cases of *In re Ball* (2), and *In re Robinson* (3), cannot be considered as having laid down inflexible rules on the subject. The Court in each case must look to the particular circumstances of the case with reference to what is just to the aggrieved client. In this particular case the solicitor was subjected to the process of execution. But the execution was met by a bill of sale, which was given a few days before the trial. The solicitor denies that

(1) 15 W. R. 46; 15 L. T. 161. (2) Law Rep. 8 C. P. 104.
(3) 10 B. & S. 75.

it was given for the purpose of defeating an execution, but at all events it had that result. It is a matter, no doubt, to be taken into consideration in exercising our discretion, that other proceedings have been taken by the aggrieved client. But still we must come back to the circumstances of the particular case and say what, having regard to those circumstances, justice requires. The solicitor has in this case defeated the client's legal execution by an act of his own, and he fails to satisfy us that at this very moment he has not still got this money belonging to his client in his hands. It is, therefore, impossible to say that he has satisfied his obligations as an officer of the Court, and, till he does that, the punitive jurisdiction of the Court is no doubt applicable. The question is whether an order ought to be made on him to pay this money. It has been said that, though this Court might deal with him in other ways, it ought not to order him to pay the money. I cannot assent to that view. Of course we should have power to strike him off the rolls or suspend him, if we thought that a case for doing so had been made out; but that does not shew that it is not right to order him to disgorge this money of his client's which he retains. It seems to me that such an order is the least that justice requires.

KAY, L.J. The Divisional Court felt themselves put in a difficulty by the case of *In re Corbet Davies* (1), and they have held that they had no jurisdiction to make the order for which the appellant applied. I agree so fully with what has been said by the Master of the Rolls, and Bowen, L.J., on the question of jurisdiction, that I will not repeat it. If that case did decide that the fact, that the client had obtained judgment against the solicitor for the money which he wrongly retained in his hands, took away the disciplinary jurisdiction of the Court to make an order for payment of it, all I can say is that I do not agree with it. Such a view seems to me completely to ignore the ground on which such a disciplinary jurisdiction is founded. If the money was due to the client, and it was the solicitor's duty to pay it over to him, and therefore there was before the judgment a breach of duty, which subjected the solicitor to the disciplinary

(1) 15 W. R. 46; 15 L. T. 161.

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jurisdiction of the Court, how that jurisdiction could be taken away by the fact that it has been determined by the judgment in the Queen's Bench Division that the money was due, I fail to see. I am glad to find that there are decisions of the Court of Appeal in the cases of *In re Freston* (1), and *In re Dudley* (2), which lay down principles contrary to the view taken in *In re Corbet Davies.* (3) Both before and after the judgment, the solicitor was committing a breach of his duty as solicitor by not paying the money; and therefore, after as well as before the judgment, the jurisdiction of the Court to make him answer for his breach of duty existed; and it remains wholly unaffected by the fact that the original debt has been converted into a judgment debt. The only question that remains is, whether, in the exercise of its discretionary power, under all the circumstances of the case, the Court thinks it right to place the solicitor in such a position as to be liable to be dealt with for a contempt of Court.

The Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 4, provides that, with the exceptions thereinafter mentioned, no person shall, after the commencement of the Act, be arrested for default in payment of a sum of money. Then, among the exceptions is default by an attorney or solicitor in payment of a sum of money when ordered to pay the same in his character of an officer of the Court making the order. At present, it may be said that the judgment in the Queen's Bench Division is not an order upon him in his character of a solicitor, and, if it were, it does not fix any day for the payment of the money; and therefore process for contempt could not be founded upon it. It may be observed in connection with this case, that it was an old and well-established practice in the Court of Chancery, where an order was made by the Court for payment of money or performance of any other act, which did not prescribe any time within which the money was to be paid, or the act performed, that the person who had obtained the order might come to the Court and obtain a supplementary order fixing such a time. This was called a four day order. I do not say that the time fixed by it was always four

(1) 11 Q. B. D. 545. (2) 12 Q. B. D. 44.
(3) 15 W. R. 46; 15 L. T. 161.

days, but that is the common name for such a supplementary order. The object of such an order was to found upon it process of attachment. If the original order did not fix a time within which it was to be performed, it was necessary to obtain against the person upon whom it was made another order fixing a time, before an application could be made to commit him for disobedience. If such supplementary order was made, and the person against whom it was made did not pay the money or perform the act which he was directed to pay or perform by the day fixed, then he was liable to attachment for contempt: *Davies* v. *Cracraft*. (1) That procedure would probably be inapplicable to a common law judgment for debt. But it is clear, as I have said, that, notwithstanding the judgment, the solicitor remains subject to the disciplinary jurisdiction of the Court, and in the exercise of that jurisdiction the Court may, in its discretion, make an order on such terms as it thinks fit that the solicitor shall pay the money which he ought to pay in his character of solicitor before a certain day; and, if such an order is made on him, and he does not obey it, he is brought exactly within the terms of the exception in the Debtors Act to which I have referred; and, that being so, proceedings against him for contempt can be founded on the order. The particular circumstances of this case were shortly these. A debt was due from this solicitor in his character as such. He had received money for his client, against which he alleged that he had a claim. That claim was litigated in an action, and it was found that he owed money to the extent of 156*l*. Two days before the trial he executed a bill of sale, by which, when the execution was put in, the sheriff was met. To say the least, I think that that was a very suspicious circumstance. It looks very much as if the bill of sale was executed for the purpose of defeating an execution, though he denies that it was so. Whether that be so or not, he has made an affidavit, and he nowhere says in it that he has not the means of satisfying this judgment. I do not say that it would have excused him if he could have said that he had no means to pay this money; but there seems to me no doubt that he would have said it, if he could. The only way, as it seems to me, in which

(1) 14 Ves. 143, 144.

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the Court can do justice in the exercise of its discretionary jurisdiction is by making the order which the Master of the Rolls has mentioned, viz., that the solicitor should pay this money in a month; but, on the other hand, that no proceedings should be taken upon the judgment in respect of the debt without the further order of the Court.

Appeal allowed.

Solicitors for appellant: *Leggatt, Rubinstein & Co.*

E. L.

1892
May 10.

GEBHARDT *v.* SAUNDERS.

Metropolis—Management Acts—Nuisance—Defect of Structural Character—Notice to Abate served on Owner or Occupier—Abatement by Occupier—Liability of Owner to recoup Occupier Expenses of Abatement—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *ss.* 4, 11.

The plaintiff was tenant from year to year to the defendants of a house in London, in which a nuisance arose by reason of water and sewage collecting in the cellar owing to a stoppage in the drains. The sanitary authority, acting under s. 4, sub-s. 1, of the Public Health (London) Act, 1891, served a notice at the premises directed to the owner or occupier, and requiring the nuisance to be abated; they did not serve on the owner a notice under s. 4, sub-s. 3, which provides for the service on the owner of a notice to abate in cases where the nuisance arises from any want or defect of a structural character. The plaintiff, who under s. 4, sub-s. 4, was liable to a penalty of 10*l.* if he made default in complying with the requisitions of the notice, did the necessary work, in the course of which it was discovered that the nuisance arose from a structural defect in the drains:—

Held, that the plaintiff was entitled under s. 11, sub-s. 1, of the Act to recover from the defendants the costs and expenses incurred in abating the nuisance as money paid by him for the use and at the request of the defendants, although no notice under s. 4, sub-s. 3, had been served upon the defendants as owners of the premises:—

Held, further, that the costs and expenses incurred in carrying "the order" into effect must be taken to include the costs and expenses of carrying into effect the "notice" from the sanitary authority, although no "nuisance order" under s. 5 had been obtained by the sanitary authority upon complaint to a petty sessional division.

Per Charles, J.: Apart from the provisions of s. 11, the plaintiff was entitled to recover at common law on the ground that he had been compelled to expend money upon work for which the defendants were legally responsible.

APPEAL of the plaintiff from a judgment of nonsuit directed by the judge of the City of London Court.

The plaintiff was tenant from year to year of a house belonging to the defendants. On January 19, 1892, during the currency of the plaintiff's tenancy, water and sewage were discovered to have collected in the cellar owing to a stoppage of the drains, and notice of the fact was given by letter by the plaintiff to the defendants. It was impossible then to determine whether the nuisance was caused by a structural defect in the drains or by improper user by the tenant, and on January 22, the sanitary authority, whose attention had been called to the matter by the plaintiff, served upon the premises a notice addressed to the owner or occupier requiring the nuisance to be forthwith abated. (1) The plaintiff, in compliance with the terms of this

(1) By s. 4, sub-s. 1, of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76): "On the receipt of any information respecting the existence of a nuisance liable to be dealt with summarily under this Act, the sanitary authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act, default, or sufferance the nuisance arises or continues; or, if such person cannot be found, on the occupier or owner of the premises on which the nuisance arises, requiring him to abate the same within the time specified in the notice, and to execute such works and do such things as may be necessary for that purpose. . . . ."

By sub-s. 3 (*a*): "Where the nuisance arises from any want or defect of a structural character, or where the premises are unoccupied, the notice shall be served on the owner."

By sub-s. 4: "Where a notice has been served on a person under this section, and . . . . such person makes default in complying with any of the requisitions of the notice within the time specified, he shall be liable to a fine not exceeding 10*l.* for each offence, whether any such nuisance order as in this Act mentioned is, or is not, made upon him."

By s. 11, sub-s. 1: "All reasonable costs and expenses incurred in serving notice, making a complaint, or obtaining a nuisance order, or in carrying the order into effect, shall be deemed to be money paid for the use and at the request of the person on whom the order is made; or, ... if no order is made, but the nuisance is proved to have existed when the notice was served or the complaint made, then of the person by whose act, default, or sufferance the nuisance was caused; and in case of nuisances caused by the act or default of the owner of premises, such costs and expenses may be recovered from any person who is for the time being owner of such premises."

By s. 120, sub-s. 4: "Whenever in any proceeding under the provisions of this Act relating to nuisances it becomes necessary to mention or refer to the owner or occupier of any premises, it shall be sufficient to designate him as the 'owner' or 'occupier' of such premises, without name or further description."

By s. 128, sub-s. 1: "Any notice, order, or other document required or authorized to be served under this Act may be served by delivering the same, or a true copy thereof, either to

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notice, which was the only notice given by the sanitary authority, did the necessary work at an expense of 18*l.* 5*s.* 7*d.* Upon the trial of an action brought by the plaintiff to recover from the defendants the above sum of 18*l.* 5*s.* 7*d.*, the jury found that the nuisance was caused by a want or defect of a structural character in the drains. The learned judge nonsuited the plaintiff upon the ground that under s. 4, sub-s. 3, the sanitary authority were bound to serve a notice upon the defendants as owners in order to make them liable for the expenses of abating a nuisance caused by a structural defect, and that the plaintiff was not entitled in law to recover the amount expended by him in abating the nuisance.

The plaintiff appealed.

Fullarton, Q.C., and *Johnston Watson*, for the plaintiff. The nonsuit was wrong. The scheme of the Act is to enable a local authority, in cases where the person who has caused a nuisance cannot be found or where it cannot at the moment be determined who has caused it, to compel the owner or occupier, however innocent, to do the necessary work, the expenses being money paid on behalf of the person who caused the nuisance. Here it was impossible before doing the work to determine whether the cause of the nuisance was a defect of a structural character in the drains, and the sanitary authority, being unable then to serve a notice on the owner under s. 4, sub-s. 3, rightly served a notice under sub-s. 1 on the owner or occupier on the ground that the person causing the nuisance could not then be found. The plaintiff was compellable to do the work, and was not a mere volunteer; for under s. 4, sub-s. 4, he was liable to a fine of 10*l.* for disobedience to the notice; and the defendants were compellable to do it, for it turned out that the nuisance was caused by a structural defect in the drains for which they were respon-

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or at the usual or last known residence in England of the person to whom it is addressed, or, where addressed to the owner or occupier of premises, then to some person on the premises. . . . ."

By sub-s. 3: "Any notice by this Act required to be given to or served on the owner or occupier of any premises may be addressed by the description of the 'owner' or 'occupier' of the premises (naming them), in respect of which the notice is given or served, without further name or description."

sible. The expenses are clearly recoverable under s. 11; they have been incurred in a case where no order was made, and are money paid for the use of "the person by whose act, default, or sufferance the nuisance was caused."

Witt, Q.C., and *Rufus Isaacs*, (*Stuart* with them), for defendants. There was no legal liability on the plaintiff as occupier to do the work; the defects were structural, and the defendants as owners could have been compelled to abate the nuisance on being served with a notice as owners under s. 4, sub-s. 3, which was a condition precedent to their liability to do the work. The plaintiff in doing work which, if the proper notice had been served, the defendants were liable to do, acted as a mere volunteer, and has no remedy against his landlord either under s. 11 or by virtue of the common law. Under s. 11 the expenses recoverable are those of carrying "the order" into effect; that is, a "nuisance order" obtained under s. 5 by a sanitary authority on complaint to a petty sessional division; it does not give a right to recover expenses where no such order has been made, and there has merely been a notice from the sanitary authority to abate the nuisance.

DAY, J. I am of opinion that this appeal must be allowed. The action is brought by the occupier of a house to recover from the defendants, who are the owners and landlords, the costs necessarily incurred by him in abating a nuisance caused by a structural defect in the drains, and the plaintiff was nonsuited by the learned judge by reason of a defect in the service of notices under the Act. I think that that nonsuit was wrong, and that the plaintiff may recover as of right without proof of the matters relied on on behalf of the defendants. There can be no doubt that in consequence of the defective construction of the drains a serious nuisance did exist in the plaintiff's house, to which the plaintiff very properly called the attention of the sanitary authority; the officer of the authority went to the house and satisfied himself of the existence of a nuisance requiring immediate abatement. Being unable to determine at the time whether the nuisance arose from defective construction of the drains or from their mismanagement by the plaintiff, the officer

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took a sound view of the position; he saw that there was an accumulation of sewage in the lower part of the house dangerous to health and possibly to life, and he immediately served a notice on the premises requiring the owner or occupier (he not being then in a position to say whether the owner or the occupier might subsequently turn out to be responsible) to forthwith abate the nuisance arising from the defect in or stoppage of the drain. In that notice he does not define whether the nuisance is caused by the drain being defective or by its being stopped; but it was due to one of the two. The plaintiff had already very properly given notice of the defective state of the drain to the defendants, who however did nothing; common sense and the necessity of the case made it necessary for something to be done forthwith, and as either the plaintiff or the defendants was bound to do that something the plaintiff proceeded to do it; had he not done so he would have been liable under s. 4, sub-s. 4, of the Act of 1891 to a penalty of 10*l*. He then brings this action to recover the expenses from the defendants.

The difficulty in the present case is no greater than that which one ordinarily expects to find in the construction of a modern statute. The gist of the enactment is this: where there is a nuisance injurious to life or health measures are to be taken to secure its speedy abatement; the expenses of abating the nuisance are cast on the person who caused it by his acts or defaults. This is a reasonable scheme; is it carried out by the different sections of the statute? In my opinion, whatever criticisms may be passed upon their wording, the sections do contain such a provision. By s. 4, sub-s. 1, a notice is to be served on the occupier or owner, and, by sub-s. 4, disobedience to such notice entails a fine of 10*l*. a day. It is urged on behalf of the defendants that if the occupier does the work which the owner ought to have done, and the owner has not been served at his place of abode with a notice under sub-s. 3 requiring him to abate the nuisance, the occupier must do it at his own cost. I have rarely heard a proposition so unreasonable. The gist of s. 11 is that, if the occupier does the work in order to abate a nuisance for which the owner is responsible, he may recover from the latter the expenses incurred in doing it. It is true that the

section provides in terms only for the expenses incurred in carrying "the order" into effect, and that one would have expected it to have said "the notice or the order"; but the word "order" must clearly be taken to include "notice," for disobedience to the notice entails a penalty; the section, therefore, applies to the expenses incurred in carrying out the notice or order in the sense of doing the work. If two people are required to do certain work under a penalty in case of disobedience, and one does the work, and it turns out afterwards that the other ought to have done it, the expenses are properly money paid at the request of the person who was primarily liable, but who neglected to do the work. There are no merits in this defence; and as the technical points upon which the defence was based have failed, judgment must be entered for the plaintiff.

CHARLES, J. I am of the same opinion. The case is one of some difficulty, owing to the complexity of the sections; but I entertain no doubt that our judgment ought to be in favour of the plaintiff.

The first question is, Was the plaintiff legally compellable to do this work? I think he was. It seems that there was in the plaintiff's house a drainage defect which, being latent, was one of which the sanitary authority may reasonably be held to be unable to find the author; they were, therefore, warranted in serving notice under s. 4, sub-s. 1, on the occupier or owner to abate the nuisance. Such a notice was served upon the plaintiff's premises, requiring the abatement of the nuisance forthwith. Did that notice impose upon the plaintiff the legal liability to obey it? Having regard to the provisions of sub-s. 4, for the imposition of a penalty for default in compliance, I am clearly of opinion that it did. It is contended, however, that the plaintiff was not legally liable to do the work, because in the result it turned out that the defects were structural. Now, there is no doubt that under the proviso in s. 4, sub-s. 3, where the defects are structural, notice is to be served on the owner; it turned out in the present case that they were structural: hence the defendants' contention. It is impossible, having regard to the language of sub-s. 1, to assent to this argument; looking at that sub-section

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it seems clear that, if on inspection the cause of the nuisance cannot be found, it is right to serve the notice on the occupier. This first question must, therefore, be answered in the affirmative.

The second question is whether the defendants were legally compellable to do the work. The jury found that the nuisance was caused by a structural defect; the moment that that defect was discovered the defendants were the proper persons to do the work, and were bound to do it. I think, therefore, that it having been proved that a nuisance existed, and that it arose from a structural defect in the drain, the defendants were legally compellable to set it right. In my opinion the ordinary principle of law is applicable to this case apart from the statute, the principle applicable to cases where one man has been legally compelled to expend money on what another man ought to have done, and, without having recourse to s. 11, the plaintiff is entitled to recover from the defendants as having been legally compelled to incur expense in abating a nuisance which the defendants themselves ought to have abated. As to the construction of s. 11, I agree with my brother Day. It is a difficult section to construe; but I think that a reasonable construction to place upon it is that where no order for the abatement of a nuisance is actually made, but the nuisance is abated in obedience to a notice from the sanitary authority, the expenses of abatement must be borne by the person causing the nuisance. Beyond all doubt the owners are here the persons responsible for the existence of this nuisance, and ought to pay for its abatement. It is contended that the section only applies where a nuisance order has been obtained; but I feel no difficulty in reading it otherwise so as to apply it to the expenses of serving a notice and carrying the notice into effect. In a sense, indeed, the notice is an order, for it is a requirement that certain things shall be done. I think, therefore, that both apart from and in accordance with s. 11, the plaintiff has proved his case.

Judgment for plaintiff.

Solicitors for plaintiff: *Leslie, Antill, & Arnold.*
Solicitors for defendants: *Saunders & Co.*

W. J. B.

[IN THE COURT OF APPEAL.]

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July 18.

GORDON *v.* WILLIAMSON.

Metropolis—Local Management—Vestryman—Qualification—Rating—Occupation—Metropolis Local Management Act, 1855 *and* 1856 (18 *&* 19 *Vict. c.* 120, *s.* 6; 19 *&* 20 *Vict. c.* 112, *s.* 8.

By s. 6 of the Metropolis Local Management Act, 1855 (as amended by s. 8 of the Metropolis Local Management Act, 1856), no person shall be capable of acting or being elected as a vestryman for any parish unless he occupies premises in the parish of a rateable value of not less than 40*l.*

The defendant was the tenant of premises which appeared in the rate-book as of the rateable value of 125*l.* He sublet a portion of such premises and occupied the remainder. The portion which he retained in his own occupation was found by the jury to be of a rateable value of not less than 40*l.*, but was not separately assessed in the rate-book. The defendant occupied no other premises in the parish. In an action to recover penalties from the defendant for acting as a vestryman without being duly qualified:—

Held, reversing the judgment of Denman, J., that the defendant was qualified by rating and occupation to act as a vestryman.

APPEAL from a judgment of Denman, J. (reported [1892] 1 Q. B. 616).

The action was brought under s. 54 of the Metropolis Local Management Act, 1855, to recover from the defendant five penalties of 50*l.* each for acting as a vestryman without being duly qualified by rating and occupation, as required by the Act.

The defendant was in May, 1890, elected a member of the vestry for the parish of St. Mary, Islington, which is one of the parishes to which the Act applies mentioned in Sched. A of the Metropolis Local Management Act, 1855. He was tenant of certain premises in the parish known as 57A, Ashburton Grove, consisting of a yard, sets of stables round the yard, and a workshop. These premises were rated as one tenement at the rateable value of 125*l.*, and the defendant was rated as the occupier, and paid the rate on the whole premises. He did not, in fact, occupy the whole, as he had sublet a portion. He occupied no other premises in the parish. Having been elected, he attended the vestry meetings, and voted as a vestryman on five different occasions. The action was tried before Denman, J., and a jury; and the jury found that the portion of the premises

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retained by the defendant in his own occupation was of a rateable value of more than 40*l.* The judge reserved for further consideration the question whether, upon the above facts, the defendant was sufficiently qualified, and ultimately determined that he was not so qualified, and gave judgment for the plaintiff. (1)

The defendant appealed.

1892. July 12. *Channell, Q.C.*, and *Wedderburn*, in support of the appeal. The difference between this case and *Mogg* v. *Clark* (2) and *Reg.* v. *Soutter* (3) is, that in the present case that which the defendant occupies is in fact of sufficient rateable value. He satisfies the requirement of the statute (4), for he occupies premises which are assessed to the relief of the poor at a rateable value of not less than 40*l.* per annum. It is true they are not separately assessed; but the statute does not say that they are to be, and there is no duty on the occupier to have them separately assessed. It is enough that the jury can see that of the entire rateable value a proportionate part, not less than 40*l.* per annum, is attributable to the premises the defendant occupies.

J. E. Bankes, contrà. Rateable value is the creation of statute; it is determined by the proper authorities, and no other tribunal is competent to assess it. No one is qualified by rating and occupation within the meaning of these Acts unless he occupies premises the rateable value of which appears by the rate-book to be not less than 40*l.* per annum. The Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), repeals s. 2 of 6 & 7 Wm. 4,

(1) [1892] 1 Q. B. 616.

(2) 15 Q. B. D. 82; 16 Q. B. D. 79.

(3) [1891] 1 Q. B. 57.

(4) By 18 & 19 Vict. c. 120, s. 6: "The vestry elected under this Act in any parish shall consist of persons rated or assessed to the relief of the poor upon a rental of not less than forty pounds per annum, and no person shall be capable of acting or being elected as one of such vestry for any parish unless he be the occupier of a house, lands, tenements, or hereditaments in such parish, and be rated or assessed as aforesaid upon such rental as aforesaid within such parish."

By 19 & 20 Vict. c. 112, s. 8, it is provided that the amount specified in the column headed "rateable value," in the form in the schedule to 6 & 7 Wm. 4, c. 96, shall be deemed the rental for the purposes of 18 & 19 Vict. c. 120.

c. 96; so that s. 8 of the Metropolis Management Act, 1856, which is founded on that section, is no longer in force, and the form in force is that given by the 4th schedule of 32 & 33 Vict. c. 67; and by s. 45 the valuation list for the time being in force is to be conclusive evidence of the rateable value of the hereditaments included therein, for the purposes (among other things) of acts relating to the qualification of a vestryman.

Channell, Q.C., in reply.

Cur. adv. vult.

1892. July 18. LORD ESHER, M.R. In this case the plaintiff sues the defendant to recover five penalties of 50*l.* each for acting as a vestryman without being duly qualified. The case was tried before Denman, J., who found that the defendant was not duly qualified, and gave judgment for the plaintiff. The question is, whether we agree with that judgment. The circumstances were that the defendant was rated in the rate-book in respect of certain premises consisting of sets of stables round a yard. The whole of the premises were rated as one occupation at a rateable value of 125*l.*, and the defendant was rated for and paid the rates on the whole. At the trial it was alleged by the plaintiff that the defendant did not occupy the whole of the premises which were rated, but only a part; and that, inasmuch as it had been held that to be rated was not sufficient without occupation, the defendant was not qualified. Denman, J., took this view, and gave judgment for the plaintiff. He founded his judgment on that of this Court in *Reg.* v. *Soutter* (1), which adopted the decision in *Mogg* v. *Clark.* (2) The learned judge adopted from the judgment of this Court the proposition that the meaning of the section is that the person to be qualified must be rated on premises to the requisite amount, and must occupy the premises for which he is so rated: *Reg.* v. *Soutter* (3); but he added to this proposition that the sufficiency of the qualification as regards rateable value of the premises occupied must appear by the rate-book. The question is, whether that is the true explanation of that decision.

(1) [1891] 1 Q. B. 57. (2) 15 Q. B. D. 82.
(3) [1891] 1 Q. B. at p. 60.

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Lord Esher, M.R.

The defendant was rated for all the premises in and surrounding the yard. That was the subject-matter the rateable value of which was determined. What is it that conduces to that rateable value? To my mind, it is each and every part of the subject-matter, and what is determined is the rateable value of the whole and of each and every part of it. If that is so, is it a true proposition to say that the defendant occupied premises the rateable value of which was not less than 40*l.*? Evidence was admitted at the instance of the plaintiff to shew what portions of the premises the defendant did not occupy, and then the learned judge admitted evidence to shew what portion of the 125*l.*, the rateable value of the whole, was attributable to the part that the defendant occupied, and the jury found that such part was of a rateable value of more than 40*l.* per annum. If this evidence was admissible, how does the matter stand? It would appear that the defendant occupied premises of a rateable value of not less than 40*l.* per annum, and was rated in respect of these premises. If so, the question is, whether, though it is true to say that he occupied premises of the requisite value, it must appear on the rate-book, not that he is rated, for that does appear, but that he is separately rated in respect of the premises which he occupies. Why should we, unless we are obliged to do so, shut out the truth, and say that, because the rating includes something that he does not occupy—however small that part may be in comparison with the whole—he is to be treated as if he did not occupy enough to satisfy the requirements of the statute? I cannot find any words in the Act that say this; neither, indeed, did the learned judge; but he said he had consulted my brother Lopes as to the view taken in *Mogg* v. *Clark* (1) and *Reg.* v. *Soutter* (2), and came in effect to the conclusion that those cases decided that you may look beyond the rate-book to see what it is a man occupies, but may not look beyond it to see what is the rateable value of what he occupies. In these two cases, on looking beyond the rate-book, it was found that the defendant did not occupy the whole, but only a part, of the premises for which he was rated, and that such part was not of the requisite rateable value. To get at that result, everything was done which was

(1) 15 Q. B. D. 82. (2) [1891] 1 Q. B. 57.

done here, where evidence shewed that the defendant occupied only part of the premises for which he was rated; but evidence also shewed that the part which he did occupy was of greater rateable value than 40*l.* per annum. Such a course seems to me to be carrying out, and not going contrary to, these cases.

The rate-book is, no doubt, conclusive in some respects. It is conclusive as to the rateable value of the premises rated, and is the only evidence of the rateable value of these premises as a whole. It is clear that if the rateable value appeared as less than 40*l.* per annum, no inquiry could be instituted as to whether this was right, for the occupier would not be sufficiently rated as required by the statute. The question here is an entirely different one, and I do not see anything to prevent the inquiry, what proportion of the rateable value of the whole is attributable to the part actually occupied; and if that is established to be not less than 40*l.* per annum, the requirements of the statute are satisfied. I cannot, therefore, agree with the decision appealed from, and the appeal must be allowed and judgment entered for the defendant.

BOWEN, L.J., read the following judgment. To be qualified as a vestryman, the occupier must occupy hereditaments in the parish, and he must be rated in respect of such occupation on a rateable value of not less than 40*l.* a year (18 & 19 Vict. c. 120, s. 6; 19 & 20 Vict. c. 112, s. 8). The rateable value must be taken from the column appropriated to that subject-matter in the rate-book, and it is clear both from the Metropolis Local Management Act, 1855, itself (s. 6), and from the interpretation put on it in *Reg.* v. *Soutter* (1), that the rating must be in respect of the premises which he occupies, and that if it appears from evidence in the case that the rating is not in respect of the occupation, the qualification is not complete. That case, as it seems to me, decides this, and nothing more than this, and cannot be pressed further. In the present instance, the defendant was tenant of premises which appeared in the rate-book as of a rateable value of 125*l.* He sublet a portion, and occupied the rest. By 32 & 33 Vict. c. 67, s. 45, the column in the rate-book containing the

(1) [1891] 1 Q. B. 57.

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rateable value is made conclusive as to all matters which it contains, and, applying this last-mentioned statute to the present case, it follows that the rate-book conclusively shews that the defendant is rated in respect of the portion occupied by him (together with the portion which he has sublet) at the sum of 125*l.* in all. It is argued, on behalf of the plaintiff, that it does not follow that the whole sum of 125*l.* is applicable to the premises actually occupied. That, no doubt, is true; but it is equally true that the rate-book shews conclusively that a portion of the 125*l.* is so applicable. How much, then, of the total sum must be taken to be referable to the occupied premises? It appears to me that the onus lies on the plaintiff to shew that the defendant is not qualified; in other words, to satisfy the Court that of the 125*l.* in question less than 40*l.* must be attributable to the premises occupied by him. The jury have found that the occupied premises are, in fact, of a rateable value of more than 40*l.*, by which I think they must be taken to have found that more than 40*l.* of the 125*l.* was both properly attributable to, and must in fact have been attributed to his occupation. The plaintiff accordingly fails to sustain the burden of proof which the law in such cases casts on the informer as plaintiff in the action, and his action must be dismissed with costs, both here and below.

This decision is clearly in accordance with the justice of the case. Otherwise an occupier of premises to the value of thousands of pounds might, if he let off a shed upon his premises of the smallest annual value, find himself (owing to an unobserved accident on the part of a rating authority) liable not only to disqualification as a vestryman, but to an accumulation of penalties under the Act.

The present case is decisively settled by the application of the onus of proof; but I should myself not like to express an opinion that in such a case, or in similar cases, the law would not allow the rateable value column, though conclusive as to what it does contain, to be dissected and appropriated properly so far as regards a matter about which it is not explicit, in order to prevent manifest oppression and injustice, on a similar principle to that in which the law allows parts of a day to be measured as an exception to the general doctrine that a day cannot, for judicial

purposes, be split into its component parts. The statute 32 & 33 Vict. c. 67, s. 45, makes the rate-book conclusive as to what it does contain, but, where the rate-book still leaves it open to doubt how much of the rateable value is attributable to the actually occupied premises, it by no means follows that, when justice requires it, the necessary problem of dissection and appropriation must not be done in the only possible manner left open, namely, by the verdict of a jury. What a jury in such a case would, however, have to decide will be, not what they think is the true rateable value of the occupation, but what is the rateable value which in their opinion must have been placed by the rating authority on the premises occupied.

KAY, L.J., read the following judgment. This action is brought by a common informer for penalties against the defendant for acting as a vestryman without proper qualification.

The vestry is of the parish of St. Mary, Islington, which is within the Metropolis Local Management Act, 1855, and s. 54 of that Act provides that any one who acts as a member of such a vestry without "being qualified by rating and occupation as required by this Act, shall for every such offence be liable to a penalty of 50*l.*" The learned judge has given judgment for five such penalties, in all 250*l.* The qualification required is, by s. 6, that the vestryman should be "rated or assessed to the relief of the poor upon a rental of not less than 40*l.* per annum, and no person shall be capable of acting or being elected as one of such vestry for any parish unless he be the occupier of a house, lands, tenements, or hereditaments in such parish, and be rated or assessed as aforesaid upon such rental as aforesaid within such parish." "Rental," in that section, has by the later Act 19 & 20 Vict. c. 112, s. 8, been explained to mean the amount specified in the column headed "rateable value" in the schedule to the 6 & 7 Wm. 4, c. 96, which contains two columns, one with that heading and the other headed "gross estimated value."

It has been decided in *Mogg* v. *Clark* (1) and in *Reg.* v. *Soutter* (2) that the qualification requires the occupation of a

(1) 15 Q. B. D. 82.

(2) [1891] 1 Q. B. 57.

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Kay, L.J.

tenement of that rateable value, and that the occupier of a house which is separately rated at less is not qualified by being also rated for other property in the parish which he does not occupy to an amount which, with his occupation, makes up 40*l.*

In this case, the defendant is rated at 125*l.* He occupied a portion of the premises so rated. He let off part consisting of a stable, and did not occupy that, but by arrangement with his tenant he paid the rates for it. The jury found that the part which he did occupy, taking the rateable value of the whole to be 125*l.*, had a rateable value of more than 40*l.* It is said this should appear in the valuation list or rate-book, and that if the rateable value has not been apportioned there no other evidence can be received, and for this reference is made to 32 & 33 Vict. c. 67, s. 77, which repeals part of 6 & 7 Wm. 4, c. 96, and provides, by s. 45, that the valuation list for the time being in force shall be conclusive evidence of the rateable value. An enactment that the valuation list shall be conclusive evidence of something stated in it does not mean that no other evidence shall be given of something not stated in it. The consequence of this construction would be that, if an owner of a tenement, the rateable value of which in the list was 1000*l.*, were to let off a detached shed worth 1*s.* a week or 1*s.* a year, he would be liable to penalties for acting as a vestryman, because the list did not apportion the 1000*l.* between the shed let off and the rest of the premises. There is no duty imposed upon the person rated to obtain this apportionment. In this case the valuation list is conclusive evidence that the defendant is rated at 125*l.*, and that this is the rateable value of the premises in his occupation, together with others not in his occupation. It is for the plaintiff to make out that the portion which the defendant occupies is not of the rateable value of 40*l.*; not only has he not done so, but the jury have found that fact against him. The learned judge thought that the point was concluded in favour of the plaintiff by the language of the judgments in the cases I have mentioned. But the question we have to decide did not arise in either of those cases. In both those cases the rate-book shewed that the premises actually occupied were of less rateable value than 40*l.* I do not read the language as necessarily deciding this question, and the

Master of the Rolls who gave the first judgment in the case of *Reg.* v. *Soutter* (1) concurs in this view.

I therefore think that the decision should be reversed, and that the action should be dismissed with costs, both here and in the Court below.

Appeal allowed.

Solicitors for plaintiff: *Oldfield, Bartram, & Oldfield.*
Solicitor for defendant: *H. B. Wedlake.*

A. M.

[IN THE COURT OF APPEAL.]

C. A. 1892 *April* 29.

IN RE BURR. EX PARTE BOARD OF TRADE.

Bankruptcy—Scheme of Arrangement with Creditors—Approval of Court—Right of Board of Trade to appeal against Order of Approval—Bankruptcy Act, 1890 (53 & 54 *Vict. c.* 71), *s.* 3 (9)—*Bankruptcy Rules, November* 26, 1890, *r.* 24.

Sect. 3 of the Bankruptcy Act, 1890, provides, by sub-s. 9, that "if any facts are proved on proof of which the Court would be required either to refuse, suspend, or attach conditions to the debtor's discharge were he adjudged bankrupt, the Court shall refuse to approve" a scheme of arrangement with his creditors proposed by the debtor, and accepted by the statutory majority of the creditors, "unless it provides reasonable security for payment of not less than 7*s.* 6*d.* in the pound on all the unsecured debts provable against the debtor's estate":—

Held, that, even though a proposed scheme provides reasonable security for the payment of 7*s.* 6*d.* in the pound, the Court is not bound to approve the scheme, but has a discretion in the matter.

Whether, if some of the creditors agree to withdraw their claims, and the scheme provides reasonable security for the payment of 7*s.* 6*d.* in the pound to the other unsecured creditors, it can be said that the security extends to all the unsecured debts provable, *Quære.*

Rule 24 of the Bankruptcy Rules of November 26, 1890, provides, that "an appeal to the Court of Appeal shall lie at the instance of the Board of Trade from any order of the Court" of Bankruptcy upon an application for the approval of a scheme:—

Held, that this rule gives the Board of Trade a right to appeal against an order approving of a scheme, even though the official receiver supported or did not oppose the application for approval.

APPEAL by the Board of Trade against an order approving of a scheme of arrangement of the affairs of Arthur Burr, a debtor

(1) [1891] 1 Q. B. 57.

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against whom a receiving order had been made on the petition of a creditor on August 10, 1891.

The debtor was a financial agent.

The report of the official receiver stated that at a meeting of the debtor's creditors on November 4, 1891, the following proposal for a scheme of arrangement of his affairs was made by the debtor:—

"1. That all my property which would be divisible amongst my creditors, if I were adjudged bankrupt, be vested in one or more trustees, to be appointed by my creditors, to be administered by him or them in the like manner, and with the like provisions, powers, and duties, and subject to the like conditions in all respects as though I had been adjudged bankrupt, and such trustee or trustees had been so appointed in the bankruptcy.

"2. That two of my creditors, whose debts together amount to 30,000*l.*, and the unsecured portion of whose debts amounts to 15,000*l.*, in consideration of the acceptance and approval of this scheme, will consent in writing to release their claims, and to transfer to, or release in favour of, the trustees, for the benefit of the general body of creditors, the security they hold upon the Bellagio Estate, Limited, and the Frith and Hackenden estates, which security is of the estimated value of 15,000*l.*"

3. That, upon the approval of the scheme by the Court, the receiving order shall be rescinded.

4. That the payment in priority of all debts entitled to priority in bankruptcy shall be provided for by deposit of the amount required with the official receiver.

5. That provision for the payment of costs, fees, and percentages shall be made by a similar deposit.

The creditors at the meeting passed a special resolution accepting this proposal.

The official receiver reported that the terms of the debtor's proposal were reasonable and calculated to benefit the general body of creditors. He also reported that, having regard to all the facts, and in particular that the trustee nominated under the proposed scheme had informed him that he had already received an offer to purchase the assets of the estate for a sum sufficient to

pay the creditors 7*s.* 6*d.* in the pound, and that he was of opinion that a better offer would be obtainable, as soon as he should be in a position to deal with the estate under the scheme, the debtor's proposal provided reasonable security for payment of not less than 7*s.* 6*d.* in the pound on the unsecured debts provable against the debtor's estate.

The official receiver further reported:—

"That the debtor has brought on or contributed to his failure by rash and hazardous speculations; that the debtor has omitted to keep such books of account as are usual and proper in the business carried on by him, and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his insolvency; that the debtor has been adjudged bankrupt on two previous occasions."

On January 6, 1892, the solicitors of the two creditors referred to in paragraph 2 of the proposed scheme wrote to the official receiver that, "Upon the scheme being approved by the Court, our clients will release their claims as creditors of Mr. Burr's estate, and also their securities upon the Bellagio Estate, Limited, and the Frith and Hackenden estates, as proposed, for the benefit of the other creditors."

The offer to purchase the debtor's assets referred to in the report of the official receiver had been made by a company called the Private Investors Association, Limited. In February, 1892, an order was made to wind up that company.

After hearing evidence, the registrar made the following order: "The Court being satisfied that the terms of the scheme are reasonable and calculated to benefit the general body of creditors, and that the case is not one in which the Court would be required, if the debtor were adjudged bankrupt, to refuse an order of discharge, and, being satisfied that facts have been proved which would justify the Court in refusing, qualifying, or suspending an order of discharge, but that, having regard to the nature of such facts, and the scheme providing reasonable security for the payment of not less than 7*s.* 6*d.* in the pound on all the unsecured debts provable against the debtor's estate, the said scheme is hereby approved." The receiving order was rescinded. The official receiver appeared on the hearing of the application

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for the approval of the Court, and informed the registrar that he had no objection to make to the scheme.

The Board of Trade appealed against the order of approval.

Sir E. Clarke, S.G., and *Muir Mackenzie*, for the appellants.

Bigham, Q.C., and *F. Cooper Willis*, for the debtor, took the preliminary objection that the Board of Trade had no locus standi to appeal. By s. 104, sub-s. 2, of the Bankruptcy Act, 1883, a right of appeal is given to "any person aggrieved." The Board of Trade are not aggrieved by this order.

[*Muir Mackenzie*, for the appellants. Rule 24 of the Bankruptcy Rules of November 26, 1890 (1), gives the Board of Trade a right to appeal.]

(1) Sect. 3 of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), provides (inter alia): "(7.) The Court shall, before approving the proposal, hear a report of the official receiver as to the terms thereof, and as to the conduct of the debtor, and any objections which may be made by or on behalf of any creditor.

"(8.) If the Court is of opinion that the terms of the proposal are not reasonable, or are not calculated to benefit the general body of creditors, or in any case in which the Court is required, where the debtor is adjudged bankrupt, to refuse his discharge, the Court shall refuse to approve the proposal.

"(9.) If any facts are proved on proof of which the Court would be required either to refuse, suspend, or attach conditions to the debtor's discharge were he adjudged bankrupt, the Court shall refuse to approve the proposal, unless it provides reasonable security for payment of not less than seven shillings and sixpence in the pound on all the unsecured debts provable against the debtor's estate.

"(10.) In any other case the Court may either approve or refuse to approve the proposal."

Sect. 8 (2) provides that, in the case of a bankrupt, the Court "shall, on proof of any of the facts hereinafter mentioned, either—

"(i.) refuse the discharge; or

"(ii.) suspend the discharge for a period of not less than two years; or

"(iii.) suspend the discharge until a dividend of not less than ten shillings in the pound has been paid to the creditors; or"

(iv.) grant a discharge on certain conditions.

By "(3.) The facts hereinbefore referred to are (inter alia)—

"(*b.*) That the bankrupt has omitted to keep such books of account as are usual and proper in the business carried on by him, and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his bankruptcy:

"(*f.*) That the bankrupt has brought on, or contributed to, his bankruptcy by rash and hazardous speculations:

"(*k.*) That the bankrupt has on

The Board of Trade were represented on the hearing of the application to the registrar by their officer, the official receiver, who had reported in favour of the scheme, and in effect supported the application for its approval. After this the Board are not entitled to appeal. Rule 24 applies only to cases in which the official receiver opposes the scheme.

The Court (Lord Esher, M.R., and Fry and Lopes, L.JJ.) held that rule 24 clearly gave the Board of Trade a right to appeal.

The appeal was then heard on the merits.

Sir E. Clarke, S.G., and *Muir Mackenzie*, for the Board of Trade. The scheme does nothing more than constitute a private trustee instead of a trustee in bankruptcy. The creditors will gain nothing by it. No reasonable security is given for the payment of 7*s.* 6*d.* in the pound. It does not appear that the two creditors who are willing to give up their claims are to receive any consideration for so doing. It is not likely that valuable claims would be relinquished for nothing. The two creditors have not proved any debt, and the probability is that their claims are of no value. Independently of the release of these two claims, no security whatever is provided for the payment of the 7*s.* 6*d.* in the pound. The security which is contemplated by sub-s. 9 of s. 3 is a security independent of the debtor's estate—a security coming from an outside source. The withdrawal of these claims would only enable the debtor's estate to pay a larger dividend—it gives no security outside the estate.

Moreover, even if reasonable security is provided for the payment of not less than 7*s.* 6*d.* in the pound, sub-s. 9 does not compel the Court to approve the scheme. The Court still has a

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any previous occasion been adjudged bankrupt, or made a composition or arrangement with his creditors."

By rule 24 of the Bankruptcy Rules, November 26, 1890: "On the hearing of any application to the Court to approve of a composition or scheme, the Court shall, in addition to considering the report of the official receiver, hear the official receiver and the trustee (if any) thereon, and an appeal to the Court of Appeal shall lie at the instance of the Board of Trade, or of the trustee (if any), from any order of the Court made upon such an application."

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discretion in the matter; and when the debtor has committed such offences against the bankruptcy law as have been committed here, the Court will not allow him, by means of a scheme of arrangement, even if it is beneficial to the creditors in a pecuniary sense, to escape from all liability.

Bigham, Q.C., and *F. Cooper Willis*, for the debtor. The withdrawal of the claims of the two creditors does provide "reasonable security" for the payment of the 7*s.* 6*d.* The registrar heard the evidence, and came to the conclusion that those claims were valid, and this was the opinion of the official receiver after the investigation which he made. This Court will not readily reverse the decision of the registrar on this question of fact. Sub-s. 9 says that, when the debtor has committed the offences against the bankruptcy law which are referred to, the Court shall refuse to approve a scheme of arrangement proposed by him, unless it provides reasonable security for the payment of a dividend of not less than 7*s.* 6*d.* in the pound. It may be said that this implies that, if the reasonable security is provided, the Court is to approve the scheme. But, at any rate, the registrar exercised a judicial discretion, and this Court will not readily interfere. Even if it can be said that the scheme must provide security for the payment of all the debtor's creditors, the persons who relinquish their claims are no longer creditors.

Sir E. Clarke, S.G., in reply.

LORD ESHER, M.R. I have said before that in bankruptcy cases the Court has very often to protect creditors against themselves, and that it is our duty to see that the officers of the Court of Bankruptcy do not do that which would be of the very worst example in bankruptcy matters.

A receiving order has been made against this debtor, and on his behalf a scheme was proposed, the principal—I may say the only—object of which, so far as I can see, was that the receiving order should be rescinded, and that the Court of Bankruptcy should not deal with his property. The official receiver supported the scheme, and the registrar has approved it. The question for us is, whether we agree with the registrar in approving the scheme. In considering that question, we are entitled

to take into account facts, if they are properly brought before us, which might have been, but were not, before the registrar when he gave his decision. Our duty now is, considering the whole of the case and all the circumstances which are before us, to say whether we think that the registrar was right in approving the scheme.

Now, the case depends upon s. 3, sub-s. 9, of the Bankruptcy Act, 1890, under which the scheme cannot be approved by the Court, unless 7*s.* 6*d.* in the pound be reasonably secured to the unsecured creditors. But, even if 7*s.* 6*d.* in the pound be reasonably secured, still the Court is not bound to approve the scheme. The providing of the security is the condition upon which the Court is allowed to consider whether it will or will not approve the scheme. If the condition is not fulfilled, the Court cannot approve the scheme. If the condition is fulfilled, the Court may or may not, having regard to all the other circumstances of the case, approve the scheme. In deciding whether the scheme ought to be approved, the Court ought not to consider one fact alone—as, for instance, the fact that the creditors, or a majority of them, are willing to accept the scheme—the Court ought not to regard that fact alone, and then blindly say that, because the creditors wish the scheme to be carried out, therefore the Court will approve it. The fact that the creditors wish for it is only one of the facts which ought to be considered. It is said that the official receiver was satisfied with this scheme. That, no doubt, is a matter to be considered; but his opinion is not binding upon the Court. The Court has to form its own conclusion whether, under all the circumstances, it was right that the official receiver and the registrar should have been satisfied with the scheme. The mere fact that the 7*s.* 6*d.* in the pound is reasonably secured, if it is secured, is not sufficient: that is only the condition which entitles the Court to consider whether the scheme ought to be approved.

Now, the main ground upon which it is said that this scheme ought to be approved is the withdrawal of a claim made by two of the creditors. What is the amount of the debt due to these gentlemen? If the debt is only a small one, the withdrawal of their claim is not a sufficient consideration. If it is a large

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debt, and if nothing else had to be considered, the withdrawal might be a sufficient consideration. Upon the evidence, I think that, as to a considerable portion, at any rate, of that which is put forward as a debt, there is very great doubt whether it is due at all. Moreover, there seems to me to be no sufficient reason shewn why these gentlemen should give up their claim. It might be (I do not say it is so) that they had given it up because the debtor is a money-lender, and they are looking forward to further transactions with him. In such a case, would it be right for the Court to treat the withdrawal of a claim with such an object as a good consideration for avoiding the bankruptcy of the debtor? I think it would not. The first defect, therefore, which I find in this scheme is, that there is no satisfactory evidence either of the amount of the debt which these gentlemen are willing to give up, or of the reason for which they are prepared to give up whatever it is they propose to give up. This is one defect in the case.

Then, there is the conduct of the debtor. What has been the cause of his insolvency? It is clear that he has engaged in a succession of the wildest speculations that any man could have undertaken. He has been twice bankrupt before; and the fact of those previous bankruptcies has to be considered in determining whether the receiving order should be rescinded. There are, it is true, some qualifications of this offence; because it seems that he has since paid a considerable portion of the debts which were due under those bankruptcies; and, if that were his only offence against the bankruptcy law, it would be qualified by the fact of his having paid off a considerable portion of his debts. But then there are the other facts mentioned in the official receiver's report. He is convicted, not only of one rash speculation, but of many rash speculations of the wildest description—hardly, indeed, honest. Moreover, he had been engaged in business before, and he must have known the absolute necessity, if he wanted to succeed, of keeping proper business books. He did not keep any. This Court has held before that in any man of business, any man engaged in trade or speculation, this is one of the most grievous faults which he can commit against the bankruptcy law. What would be the result if the bankruptcy

proceedings went on? Even if he paid a large dividend, and was entitled to ask for his discharge, the Court would have to consider these facts, and would under the circumstances be almost bound to suspend his discharge.

Under these circumstances we come to look at the scheme. There is, I think, considerable doubt whether the 7*s.* 6*d.* in the pound would be realized. There is also, to my mind, the greatest possible doubt whether there is any material difference between the 7*s.* 6*d.* in the pound proposed by the scheme and the dividend which would be realized in a bankruptcy. Not knowing what is the amount really due to the two creditors, and which they are to give up, one cannot tell whether the 7*s.* 6*d.* in the pound is more than would be realized under a bankruptcy. We cannot, therefore, be sure that the creditors would gain anything substantial by the scheme, and, even if they did obtain a substantial advantage, the result would be that the debtor would escape from the consequences of the bankruptcy law. It would be of the worst possible example if he could escape from those consequences, and obtain his discharge without the delay which would be certainly imposed if the bankruptcy proceedings were to go on, even if he were to pay more than 7*s.* 6*d.* in the pound. Under these circumstances, it seems to me that the official receiver ought not to have been satisfied with the scheme, and that the registrar ought not to have approved it. Therefore, I differ from his decision, and am of opinion that this scheme must be disallowed, and the receiving order must stand. The defects are so obvious and so clear that I think we ought to refuse to allow them to be amended by means of further discussion, or by fresh evidence taken before the registrar.

FRY, L.J. This application was made under sub-s. 9 of s. 3 of the Bankruptcy Act, 1890, which provides that the Court shall refuse to approve the debtor's proposal of a scheme "if any facts are proved on proof of which the Court would be required either to refuse, suspend, or attach conditions to the debtor's discharge were he adjudged bankrupt, unless" the scheme "provides reasonable security for payment of not less than 7*s.* 6*d.* in the

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pound on all the unsecured debts provable against the debtor's estate." If that condition is satisfied, it is still left to the Court to exercise a judicial discretion. If any of the facts referred to is proved, and the scheme does provide reasonable security for the payment of 7*s.* 6*d.* in the pound, the Court may nevertheless refuse to approve the scheme, and, indeed, is bound so to refuse, if the circumstances of the case require it.

There are two questions to be considered in the present case. First, is the Court bound to refuse to approve the scheme? In my opinion, it is bound to refuse, because the condition which sub-s. 9 imposes has not been satisfied. It has not, in my opinion, been proved that this scheme provides reasonable security for the payment of 7*s.* 6*d.* in the pound. The official receiver was much influenced by the fact that the person nominated as trustee under the proposed scheme had informed him that he had already received an offer for the purchase of the debtor's assets for a sum sufficient to pay the creditors 7*s.* 6*d.* in the pound. We know now that the offer was made on behalf of a limited company, which has since been ordered to be wound up. A more fallacious and delusive offer can hardly be conceived, and I cannot help thinking that, if the nature of the proposal had been a little more carefully looked into, much less weight would have been attached to it.

Then let us see whether, with the proposed reduction of the claims upon the estate, there is any evidence that the scheme will provide for the payment of 7*s.* 6*d.* in the pound. In order to answer that inquiry we ought to know what is the value of the assets, and what is the total amount of the claims of the unsecured creditors, and with regard to both these matters we are left entirely in the dark.

But it is said that the scheme provides for the payment of 7*s.* 6*d.* in the pound because two creditors have agreed to give up their claims. I do not desire to express any opinion whether it is necessary that the payment of the whole of the debtor's creditors should be provided for by the scheme; the language of sub-s. 9 seems at first sight to require that. Whether a creditor

who gives up his claim ceases to be entitled to an unsecured debt within the meaning of this sub-section, it is not necessary now to decide. But no one has taken the trouble to inquire what is the sum really due to the two creditors, and we are asked to rely on the admissions made by the debtor, who is availing himself of the consent of these gentlemen to withdraw their claims to obtain their approval of the scheme. We do not, therefore, know whether the scheme will produce any beneficial result whatever for the creditors. I am of opinion that it is not proved that the scheme will provide reasonable security for the payment of 7*s.* 6*d.* in the pound, and that, consequently, it being admitted that some of the facts exist which are mentioned in s. 8, and which would require the Court, if the debtor were adjudged bankrupt, to refuse, suspend, or attach conditions to his discharge, the Court is bound to refuse to approve the scheme. But I go further, and I say that, even if it were proved that 7*s.* 6*d.* in the pound would be provided by this scheme, nevertheless, in the exercise of that judicial discretion which we are bound to exercise, the Court ought to refuse to give its approval to the scheme.

It appears from the report of the official receiver, which is primâ facie evidence, and, indeed, it is not disputed, that the debtor has committed three of the offences which are enumerated in sub-s. 3 of s. 8. He has omitted to keep such books of account as are usual and proper in the business carried on by him, and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his insolvency; he has brought on or contributed to his bankruptcy by rash and hazardous speculations; and he has on two previous occasions been adjudged bankrupt. Therefore he has committed three offences against the bankruptcy law. I look not merely at the fact of these technical offences having been committed, but at his whole career as disclosed by the evidence, and I say that in such a case the Court ought to adjudicate upon the debtor's discharge, and to determine whether it should be refused, or suspended, or granted subject to conditions. I regard this debtor as one of those plagues of society of whom there are too many, and upon whom I think it is the duty of the Bankruptcy Court

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to keep a sharp eye. In the exercise of my judicial discretion I therefore refuse to approve of this scheme.

LOPES, L.J. I agree, and I have nothing to add.

Appeal allowed.

Solicitors: *Solicitor to Board of Trade; W. Stopher.*

W. L. C.

C. A. 1892 *June* 24.

[IN THE COURT OF APPEAL.]

IN RE VINCE. EX PARTE BAXTER.

Bankruptcy—Proof of Debt—Loan to Trader—Interest varying with Profits—Postponement of Lender to other Creditors—Partnership Law Amendment Act, 1865 (28 & 29 *Vict. c.* 86) (*Bovill's Act*), *ss.* 1, 5—*Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *ss.* 2, 3—*Agreement void for Uncertainty.*

In October, 1889, a loan of 4500*l.* was made to a trader, upon the terms of an agreement in writing which provided that he should pay interest on the loan to the lender by two half-yearly payments of 462*l.* 10*s.* for every half-year, and that in case the borrower should be unable to pay to the lender any part of the half-yearly payments upon any part of the 4500*l.*, by reason of the deficiency of the profits of the borrower, "then and upon every such occasion a due allowance shall be made by the lender to the borrower in respect of the same in a fair and reasonable manner." In 1891 the borrower was adjudged a bankrupt. The lender claimed to prove in the bankruptcy for the balance which remained due in respect of the 4500*l.*, which had been in part repaid. The Queen's Bench Division held that the effect of the agreement was to make the rate of interest on the loan "vary with the profits" of the business, within the meaning of s. 1 of Bovill's Act, and that, consequently, the proof could be admitted only for the purpose of receiving dividend after all the other creditors of the bankrupt had been paid in full:—

Held, by the Court of Appeal, that the agreement was so obscure that it must be treated as void; that it could not, therefore, be said that the rate of interest varied with the profits; and that the lender was entitled to prove in the ordinary way for the unpaid balance of the loan as for money lent.

APPEAL against a decision of the Queen's Bench Division (Vaughan Williams and Collins, JJ.). (1)

The facts are fully stated in the report of the decision of the Queen's Bench Division, and it is considered unnecessary to repeat them.

(1) [1892] 1 Q. B. 587.

Cooper Willis, *Q.C.*, and *Eversley*, for the appellant.
Muir Mackenzie, for the trustee in the bankruptcy.

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THE COURT (Lord Esher, M.R., and Bowen and A. L. Smith, L.JJ.) reversed the decision, and allowed the appeal, on the ground that the agreement was expressed in such vague and uncertain terms that it was impossible to say in what mode the "due allowance" in diminution of the interest was to be ascertained. It could not, therefore, be said that the rate of interest varied with the profits, or that Bovill's Act applied. The agreement, being unintelligible, must be treated as void, and the appellant was entitled to prove for the unpaid balance of the loan simply as for money lent.

Appeal allowed.

Solicitors: *F. J. & G. J. Braikenridge; Crowders & Vizard.*

W. L. C.

SHARRATT *v.* SCOTNEY.

1892 *May* 10.

Army—Billeting of Soldiers—Billet List—Obligation of Victualling-house-keeper to provide Accommodation for Soldiers on the March—Army Act, 1881 (44 & 45 *Vict. c.* 58), *ss.* 103–110.

There is a statutory obligation under s. 103 of the Army Act, 1881, on the constable in charge at any place mentioned in the route issued to the commanding officer of any portion of Her Majesty's regular forces to give billets for all the officers, soldiers, and horses mentioned in the route, and for whom quarters are required; and the billet list made out under s. 107 by the police authority of any such place is not conclusive as to the number of officers, soldiers, or horses for whom the keeper of a victualling house shewn in the list may be required to find accommodation on an emergency. Such list merely determines the proportion in which the billets are to be distributed among the keepers of victualling houses, and does not relieve them from their liability to take in, or otherwise find accommodation for (according to the proportions shewn in the list), any number for whom quarters are required.

CASE stated by justices of the borough of Huntingdon under 20 & 21 Vict. c. 43.

The appellant had preferred informations against the respondents, William Scotney and Charles Allsopp, under 44 & 45 Vict. c. 58, s. 110, for that they, on March 15, 1892, unlawfully did refuse and neglect to receive ten and twelve men respectively

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of the rank and file of the 5th Battalion of the King's Royal Rifles, and to provide accommodation for the same, who had been billeted upon them by one John Marson, the billet-master of the borough. The informations were dismissed without costs by the justices.

The following facts were either proved in evidence or admitted on the hearing of the informations. The 5th Battalion King's Royal Rifles were assembled at Huntingdon for their preliminary training. The respondents were licensed victuallers, and kept inns in the borough known as the Sun and the General Peel respectively. On March 15, 1892, John Marson, the billet-master of the borough, directed billet notices to the respondents to receive and provide accommodation for ten men in the case of Scotney, and twelve men in the case of Allsopp, and the men, accompanied by their colour-sergeants, were marched to the respondents' houses; but the respondents refused and neglected to receive the men in compliance with the billet notices, alleging that they had not sufficient accommodation for the said number of men. The billet list for the borough was produced by the billet master, and shewed that in each case the number of men who could be accommodated on an ordinary occasion was six, and on an emergency eight; the justices found that nothing was said either by the sergeants who accompanied the men or by the respondents themselves as to receiving any less number of men than ten and twelve respectively.

The question for the opinion of the Court was whether the billet notices were illegal in ordering the respondents to provide accommodation for more than they were in the case of emergency called upon to receive, as shewn by the billet list. (1)

(1) By s. 103, sub-s. 1, of the Army Act, 1881 (44 & 45 Vict. c. 58), "Every constable for the time being in charge at any place in the United Kingdom mentioned in the route issued to the commanding officer of any portion of Her Majesty's regular forces shall, on the demand of such commanding officer, or of an officer or soldier authorized by him, and on production of such route, billet on the occupiers of victualling houses and other premises specified in this Act as victualling houses in that place such number of officers, soldiers, and horses entitled under this Act to be billeted as are mentioned in the route and stated to require quarters."

By s. 105, all officers and soldiers of Her Majesty's regular forces are entitled to be billeted.

By s. 106, sub-s. 1, the keeper of a

Brooke Little, for the appellant. There is, under s. 103, sub-s. 1, a positive obligation on the constable to find billets for all the soldiers on route; he is to billet on the occupiers of victualling houses, &c., such numbers as are mentioned in the route and stated to require quarters. There is a corresponding obligation on the occupiers of victualling houses to receive all for whom the constable has to find billets; but if there is not room for the number billeted on any particular house the keeper of the house may, under s. 106, sub-s. 2, provide accommodation for them elsewhere—i.e., he may board them out. The provision in s. 107, as to the making of a list of billets by the police authority, is permissive only and not compulsory; it is not conclusive as to the number of soldiers to be billeted on each house. The expression "the number of soldiers and horses who may be billeted on the keeper thereof" means who may conveniently be billeted; it is a loose expression for what the constable may consider a proper number, but it does not restrict or confine the liability to that number; any excess over the number provided for by the list must be distributed in the proportions shewn in the list. If the list is conclusive, the keeper of a newly-opened house not mentioned in an existing list would be under no liability to provide billets at all.

victualling house is to furnish accommodation for any officer, soldier, or horse billeted on him; and by sub-s. 2 he may, in case of want of accommodation or of his house being full, provide the accommodation in the immediate neighbourhood.

By s. 107, sub-s. 1, "The police authority for any place may cause annually a list to be made out of all keepers of victualling houses within the meaning of this Act in such place, or any particular part thereof, liable to billets under this Act, specifying the situation and character of each victualling house, and the number of soldiers and horses who may be billeted on the keeper thereof." By sub-s. 2 complaint may be made to a court of summary jurisdiction against being entered in the list or being entered to receive an undue proportion of officers, soldiers, or horses.

By s. 108, sub-s. 3, complaint may be made to a justice or to a court of summary jurisdiction that an undue proportion of officers, soldiers, or horses has been billeted on the complainant, and an order may be made that such of the officers, soldiers, or horses shall be removed and be billeted elsewhere as may seem just.

By s. 109, a constable who "neglects or refuses after sufficient notice is given to give billets demanded for any officer, soldier, or horse entitled to be billeted" is, on summary conviction, liable to a fine of not less than 40s. and not exceeding £10.

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Horace Avory, for the respondents. If the contention of the appellant is correct, s. 107 is really nugatory; for there is no practical use in the list if it is not conclusive and if the only right of appeal against the list is a right to appeal against an undue proportion. The soldiers for whom billets were not found were not billeted on the respondent "in pursuance of this Act," for they were not billeted in accordance with the list drawn up under the Act.

DAY, J. I am sorry to be obliged to come to the conclusion that the decision of the justices was wrong, and that the construction placed upon the Act of Parliament by the appellant is correct. That construction is one which may involve great and unnecessary hardship, primarily upon licensed victuallers, and secondarily upon the soldiers, who cannot receive reasonable accommodation. The billeting list sets out both the reasonable accommodation afforded by each house, and also the accommodation they may be expected to furnish upon an emergency; but I am constrained by the words of the statute to hold that the military authorities are entitled to require the licensed victuallers to find accommodation for even larger numbers: accommodation must be provided for any number for which the military authorities may require it.

CHARLES, J. I am of the same opinion. By s. 103 the constable is bound to find billets; if he does not find them he is liable under s. 109 to a fine, which must not be less than 40*s.* and may reach to 10*l.* The persons entitled under s. 105 to billets are "all the officers and soldiers of Her Majesty's regular forces;" there is, therefore, a parliamentary obligation on the constable to provide billets for all the officers and men of the regular forces on pain of a fine. The keeper of a victualling house is bound to receive the men sent to him, and under s. 106 it is obvious that he may be asked to receive more soldiers than the house can accommodate; in that case he must provide accommodation elsewhere. It is said, however, that his liability is limited by s. 107, under which the billet list is made out; in the present case the list was not made out annually, but

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it stands in the place of an annual list for the purposes of this case. The list shews in one case accommodation for six, in the other for eight, men; and it is said that that list is conclusive and that the military authorities cannot ask for accommodation for more. With that construction of the section I am unable to agree. The list is, in my opinion, only an indication of the proportion in which the burden is to be borne by the keepers of victualling houses; and this view derives confirmation from the fact that the appeal, which is given to a person who considers himself aggrieved, is an appeal against the billet list being made out in an undue proportion. Of course the list must be attended to, and all the billets shewn on it must be filled before any of the publicans are called upon to receive more soldiers than the number shewn on the list. The question then arises whether, assuming that too many soldiers are passing through the town for the billets shewn in the list at their fullest capacity to take them all, are they obliged to provide for the surplus? I am clearly of opinion that they are. For instance, supposing the list shews a capacity of 360 (as is the case here), and 500 men are passing through, the licensed victuallers are bound to receive or provide for the whole 500 in the same proportions as those shewn in the billeting list. I can come to no other conclusion upon the construction of the sections of the statute.

Judgment for appellant.

Solicitors for appellant: *Peacock & Goddard, for Maule & Sons, Huntingdon.*

Solicitors for respondents: *Penley & Co., for Hunnybun, Huntingdon.*

W. J. B.

1892
June 18;
July 4.

CARLILL *v.* THE CARBOLIC SMOKE BALL COMPANY.

Gaming—Contract by way of Wagering—Insurance against Disease—8 & 9 *Vict.* c. 109—14 *Geo.* 3, *c.* 48, *s.* 2.

The defendants, the proprietors of a certain medical preparation called "The Carbolic Smoke Ball," issued an advertisement in which they promised to pay 100*l.* to any person who contracted the influenza after having used one of their smoke balls, in a certain specified manner and for a certain specified period. The plaintiff, upon the faith of the advertisement, purchased one of the defendants' smoke balls, and used it in the manner and for the period specified, but nevertheless contracted the influenza:—

Held, that the above facts established a contract by the defendants to pay the plaintiff 100*l.* in the event which happened; that such contract was neither a contract by way of wagering within 8 & 9 Vict. c. 109, nor a policy within 14 Geo. 3, c. 48, s. 2; and that the plantiff was entitled to recover.

FURTHER consideration before Hawkins, J.

The defendants, who are the proprietors and vendors of a medical preparation called "The Carbolic Smoke Ball," inserted in the *Pall Mall Gazette* of November 13, 1891, the following advertisement: "100*l.* reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic influenza colds, or any disease caused by taking cold, after having used the ball three times daily for two weeks, according to the printed directions supplied with each ball. 1000*l.* is deposited with the Alliance Bank, Regent Street, shewing our sincerity in the matter.

"During the last epidemic of influenza many thousand carbolic smoke balls were sold as preventives against this disease, and in no ascertained case was the disease contracted by those using the carbolic smoke ball.

"One carbolic smoke ball will last a family several months, making it the cheapest remedy in the world at the price, 10*s.* post free. The ball can be refilled at a cost of 5*s.* Address:

"Carbolic Smoke Ball Company,
"27, Princes Street, Hanover Square, London, W."

The plaintiff, a lady, having read that advertisement, on the faith of it bought one of the defendants' carbolic smoke balls, and used it as directed three times a day, from November 20

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till January 17, 1892, when she was attacked by influenza. She thereupon brought this action against the defendants to recover the 100*l.* promised in their advertisement.

The defendants pleaded that there was no contract between the plaintiff and the defendants that the defendants should pay 100*l.* in the event which happened; and that if there was such a contract it was void, either under 8 & 9 Vict. c. 109, as being a contract by way of wagering, or under 14 Geo. 3, c. 48, s. 2, as being a contract of insurance not made in accordance with the provisions of that section, or as being contrary to public policy. The action came on for trial before Hawkins, J., and a jury; but the facts not being in dispute, the learned judge reserved the case for further consideration on the points of law raised in the defence.

Asquith, Q.C. (*Loehnis*, with him), for the defendants. First, there was no contract between the parties. The advertisement was a mere representation of what the advertisers intended to do in a certain event. The defendants did not by issuing it mean to impose upon themselves any obligation enforceable by law. That this was so is shewn by the wide terms in which it is couched, for the reward is offered to any one who contracts influenza "after having used the ball"; but they could not have meant to bind themselves to pay the money to persons who contracted the complaint years after they had ceased to use the ball. The case is not like the class of cases of which *Williams* v. *Carwardine* (1) is the leading example, in which an action has been held to lie for a reward offered by public advertisement for information leading to the discovery of crime, or to the recovery of lost property. In those cases the performance of the conditions upon which the reward becomes payable is wholly within the power of the person possessed of the information. Here the plaintiff could not by her own act entitle herself to the money, for the money would not become payable immediately upon her using the defendants' smoke ball, but only upon the happening of a further event over which she had no control, namely, her contracting the influenza.

(1) 4 B. & Ad. 621.

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Secondly, if there was a contract it was void, as being a contract by way of wagering, within the meaning of 8 & 9 Vict. c. 109. A wagering contract is one the liability to perform which depends on events beyond the control of the parties. This case is similar to *Brogden* v. *Marriott* (1), where an agreement by which the defendant sold the plaintiff a horse, on the terms that the price should be 200*l.* if within one month after the date of the agreement it trotted eighteen miles in an hour, but one shilling if it failed to do so, was held to be a wager, and void as such, under 9 Anne, c. 14. So, too, in *Rourke* v. *Short* (2), a contract for the sale and purchase of goods at a price to be regulated by ascertaining a past fact unknown to the parties at the time of the contract was held to be void as a wager. In *Taylor* v. *Smetten* (3), where the defendant sold at a fixed price packets containing a pound of tea and a coupon entitling the purchaser to a prize the amount of which was not determined till after the sale, it was held that the transaction was a gaming transaction, and an offence against the Lottery Act.

Thirdly, if there was a contract, and it was not a wagering contract, then it was a contract by way of insurance, and void under s. 2 of 14 Geo. 3, c. 48, which provides that, "It shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the person or persons, name or names, interested therein, or for whose use, benefit, or on whose account such policy is so made or underwrote."

W. Graham, (*Murphy, Q.C.*, and *Bonner*, with him), for the plaintiff. The transaction between the parties amounted to a contract of warranty of prevention of disease with liquidated damages in the event of breach. The advertisement which was issued by the defendants was an offer by them to enter into such a contract, which offer was accepted and converted into a contract upon any person performing the conditions of the advertisement. This view is in accordance with the judgments of Lord Campbell and Wightman, J., in *Denton* v. *Great Northern Ry. Co.* (4), who held that the statement by a railway company in their time-

(1) 3 Bing. N. C. 88.
(2) 5 E. & B. 904.
(3) 11 Q. B. D. 207.
(4) 5 E. & B. 860.

tables of the times at which their trains would run, amounted to a contract with any person who came to the station and tendered the price of a ticket that the trains would run at the times stated. In *England* v. *Davidson* (1), where the defendant offered a reward to whoever would give such information as would lead to the conviction of a felon, and the plaintiff gave such information, it was held that he was entitled to recover.

Upon the second point, the case of *Thacker* v. *Hardy* (2) is conclusive in favour of the plaintiff that the contract in this case was not a wager. There Cotton, L.J., says (at p. 695): "The essence of gaming and wagering is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain nature—that is to say, if the event turns out one way A. will lose, but if it turns out the other way he will win." Here the plaintiff was to win 100*l.* if she got the influenza, but the defendants were not to win anything if she did not. So in *Caminada* v. *Hulton* (3), where the publisher of a book containing information as to horse-races promised to pay a sum of money to any purchaser of the book who correctly prophesied the winning horses in certain future races, it was held that the promise was not a wager, there being no mutuality of gain and loss.

With regard to the contract being a policy of insurance, the cases go to shew that a contract to fall within the Act of Geo. 3 must be shaped in the form of a policy: *Morgan* v. *Pebrer* (4); *Cook* v. *Field.* (5) Here the plaintiff was not merely to pay a premium as in the case of an ordinary policy, but was further to do something, namely, use the smoke ball.

Loehnis, in reply. It is stated in Smith's Leading Cases, 9th ed. vol. ii. p. 311, that the Act of Geo. 3 applies to such contracts "as are ordinarily, and in the common course of business, made by way of policy." That exactly covers the case of an insurance against accident such as this.

Cur. adv. vult.

(1) 11 A. & E. 856.
(2) 4 Q. B. D. 685.
(3) 60 L. J. (M.C.) 116.
(4) 3 Bing. N. C. 457.
(5) 15 Q. B. 460.

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July 4. HAWKINS, J., delivered the following written judgment: The facts not being in dispute, I was requested to hear the legal objections discussed on further consideration, and to enter the verdict and judgment as I thought right. I have done so, and I proceed now to deliver my judgment.

Four questions require consideration in determining this case.

1st. Was there a contract of any kind between the parties to this action?

2nd. Was such contract, if any, wholly or partly in writing so as to require a stamp?

3rd. Was the contract a wagering contract?

4th. Was it a contract of insurance affected by statute, 14 Geo. 3, c. 48, s. 2.

As regards the first question, I am of opinion that the offer or proposal in the advertisement, coupled with the performance by the plaintiff of the condition, created a contract on the part of the defendants to pay the 100*l.* upon the happening of the event mentioned in the proposal. It seems to me that the contract may be thus described. In consideration that the plaintiff would use the carbolic smoke ball three times daily for two weeks according to printed directions supplied with the ball, the defendants would pay to her 100*l.* if after having so used the ball she contracted the epidemic known as influenza.

The advertisement inserted in the *Pall Mall Gazette* in large type was undoubtedly so inserted in the hope that it would be read by all who read that journal, and the announcement that 1000*l.* had been deposited with the Alliance Bank could only have been inserted with the object of leading those who read it to believe that the defendants were serious in their proposal, and would fulfil their promise in the event mentioned; their own words, "*shewing our sincerity* in the matter," state as much. It may be that, of the many readers of the advertisement, very few of the sensible ones would have entertained expectations that in the event of the smoke ball failing to act as a preventive against the disease, the defendants had any intention to fulfil their attractive and alluring promise; but it must be remembered that such advertisements do not appeal so much to the wise and thoughtful as to the credulous and weak portions of the community; and if

the vendor of an article, whether it be medicine smoke or anything else, with a view to increase its sale or use, thinks fit publicly to promise to all who buy or use it that, to those who shall not find it as surely efficacious as it is represented by him to be he will pay a substantial sum of money, he must not be surprised if occasionally he is held to his promise.

I notice that in the present case the promise is of 100*l.* *reward*; but the substance of the offer is to pay the named sum as compensation for the failure of the article to produce the guaranteed effect of the two weeks' daily use as directed. Such daily use was sufficient legal consideration to support the promise. In *Williams* v. *Carwardine* (1833) (1) the defendant, on April 25, 1831, published a handbill, stating that whoever would give such information as should lead to the discovery of the murder of Walter Carwardine should, on conviction, receive a reward of 20*l.* In August, 1831, the plaintiff gave information which led to the conviction of one Williams. The Court, consisting of Lord Denman, C.J., Littledale, Parke, and Patteson, JJ., held, that the plaintiff was entitled to recover the 20*l.* upon the ground that the advertisement amounted to a general promise or contract to pay the offered reward to any person who performed the condition mentioned in it, namely, who gave the information. If authority was wanted to confirm the view I have taken, it is furnished by the case I have just cited. (2)

This brings one to the second question, whether the advertisement, which is the only written or printed document affecting the contract, requires to be stamped as an agreement before it can be admitted in evidence. This depends upon the language of the Stamp Act, 1891 (54 & 55 Vict. c. 39), which requires "an agreement, or any memorandum of an agreement . . . . under hand only, whether the same be only evidence of a contract, or

(1) 4 B. & Ad. 621.

(2) With reference to the case of *Williams* v. *Carwardine*, Hawkins, J., appended to his judgment the following note: "In this case the Court held, that the fact, as found by the jury, that the plaintiff was not induced by the offer of the reward, but by other motives, to give the information, did not affect her right to recover. I presume, however, that the offer had been brought to her knowledge before the information was given. Otherwise, it is difficult to understand how it could be said that she was party to a contract, or gave the information in fulfilment of the condition."

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obligatory upon the parties from its being a written instrument," to be duly stamped. Whether a written or printed document falls within this requirement depends upon its character at the time it was committed to writing, or print, and issued. If at the time no concluded contract had been arrived at by the contracting parties, it certainly could not in any sense be treated as an agreement, nor could it be treated as a memorandum of an agreement, for there could be no memorandum of an agreement which had no existence. No document requires an agreement stamp unless it amounts to an agreement, or a memorandum of an agreement. The mere fact that a document may assist in proving a contract does not render it chargeable with stamp duty; it is only so chargeable when the document amounts to an agreement of itself or to a memorandum of an agreement already made. A mere proposal or offer until accepted amounts to nothing. If accepted in writing, the offer and acceptance together amount to an agreement; but, if accepted by parol, such acceptance does not convert the offer into an agreement nor into a memorandum of an agreement, unless, indeed, after the acceptance, something is said or done by the parties to indicate that in the future it is to be so considered: see *Edgar* v. *Black* (1); *Chaplin* v. *Clarke* (2); *Hudspeth* v. *Yarnold* (3); *Clay* v. *Crofts*. (4) I think for the reasons I have given, supported as they are by authority, the advertisement does not require to be stamped.

The third question is whether the contract I have found to exist is a contract by way of gaming or wagering within the meaning of statute 8 & 9 Vict. c. 109, s. 18, which renders such contracts null and void, and, therefore, not enforceable by action. I think it is not. It is not easy to define with precision what amounts to a wagering contract, nor the narrow line of demarcation which separates a wagering from an ordinary contract; but, according to my view, a wagering contract is one by which two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent upon the determination of that event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or

(1) 1 Stark. 464.
(2) 4 Ex. 407, per Maule, J.
(3) 9 C. B. 625.
(4) 20 L. J. (Ex.) 361.

other stake; neither of the contracting parties having any other interest in that contract than the sum or stake he will so win or lose, there being no other real consideration for the making of such contract by either of the parties. It is essential to a wagering contract that each party may under it either win or lose, whether he will win or lose being dependent on the issue of the event, and, therefore, remaining uncertain until that issue is known. If either of the parties may win but cannot lose, or may lose but cannot win, it is not a wagering contract.

It is also essential that there should be mutuality in the contract. For instance, if the evidence of the contract is such as to make the intentions of the parties material in the consideration of the question whether it is a wagering one or not, and those intentions are at variance, those of one party being such as if agreed in by the other would make the contract a wagering one, whilst those of the other would prevent it from becoming so, this want of mutuality would destroy the wagering element of the contract and leave it enforceable by law as an ordinary one: see *Grizewood* v. *Blane* (1); *Thacker* v. *Hardy* (2); *Blaxton* v. *Pye*. (3) No better illustration can be given of a purely wagering contract than a bet on a horse-race. A. backs Tortoise with B. for 100*l*. to win the Derby. B. lays ten to one against him—that is, 1000 to 100. How the event will turn out is uncertain until the race is over. Until then, A. may win 1000*l*. or he may lose 100*l*., B. may win 100*l*. or he may lose 1000*l*.; but each must be a winner or a loser on the event. Under the wager neither has any interest except in the money he may win or lose by it. True it is that one or both of the parties may have an interest in the property of the horse; but that interest is altogether apart from the bet, and each party is in agreement with the other as to the nature and intention of his engagement. If any one desires to read more upon the subject of wagers he will find the subject fully and clearly treated in Mr. Stutfield's able and learned book. One other matter ought to be mentioned, namely, that in construing a contract with a view to determining whether it is a wagering one or not, the Court will receive evidence in order

(1) 11 C. B. 526.

(2) 4 Q. B. D. 685.

(3) 2 Wils. 309.

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to arrive at the substance of it, and will not confine its attention to the mere words in which it is expressed, for a wagering contract may be sometimes concealed under the guise of language which, on the face of it, if words were only to be considered, might constitute a legally enforceable contract. Such was the case in *Brogden* v. *Marriott* (1), in which under the guise of a contract for the sale by the defendant to the plaintiff of a horse at a price to depend on the event of a trial of its speed and staying power, there was concealed a mere bet of the defendant's horse to 200*l.* that the horse within a month should trot eighteen miles within an hour. The defendant's horse having failed to accomplish the task set him, plaintiff claimed the horse at a nominal price of 1*s.* The nature of this contract was transparent to any person of ordinary intelligence, and the plaintiff in vain argued that it was a bonâ fide conditional bargain. The Court held it to be nothing more nor less than a mere wagering contract prohibited by the then unrepealed statute 9 Anne, c. 14. In that case the nature of the contract was very clearly to be inferred from the statement of it in the record. Of course, if in any case it is suggested that a contract good on the face of it was a mere device to elude the operation of the statute, the question would be one for a jury to solve: see also *Hill* v. *Fox* (2); *Grizewood* v. *Blane.* (3)

In the present case an essential element of a wagering contract is absent. The event upon which the defendants promised to pay the 100*l.* depended upon the plaintiff's contracting the epidemic influenza after using the ball; but, on the happening of that event, the plaintiff alone could derive benefit. On the other hand, if that event did not happen, the defendants could gain nothing, for there was no promise on the plaintiff's part to pay or do anything if the ball had the desired effect. When the contract first of all came into existence (i.e., when the plaintiff had performed the consideration for the defendants' promise), in no event could the plaintiff lose anything, nor could the defendants win anything. At the trial it was not even suggested that any evidence could be offered to alter the character of the

(1) 3 Bing. N. C. 88. (2) 4 H. & N. 359.
(3) 11 C. B. 526.

contract or the facts as deposed to by the plaintiff. I am clearly of opinion that, if those facts established a contract, as I think they did, it was not of a wagering character.

As to the objection that this contract (if any) was one of insurance, and invalid for non-compliance with the statute 14 Geo. 3, c. 48, s. 2, which enacts that "it shall not be lawful to make any policy or policies on the life or lives of any person, or other event or events, without inserting in such policy or policies the person or persons, name or names, interested therein, or for whose use, benefit, or on whose account such policy is so made or underwrote," it seems to me that the simple answer to that objection is that the section relates only to a policy which is a written document, and cannot apply to a contract like the present, which is created by a written proposal or offer accepted by the fulfilment by the plaintiff of the conditions attached to the offer. I do not feel it necessary to discuss the question whether the contract is one of insurance, which kind of contract Blackburn, J., in *Wilson* v. *Jones* (1), thus describes: "A policy is, properly speaking, a contract to indemnify the insured in respect of some interest which he has against the perils which he contemplates it will be liable to." My present opinion is that it does not amount to such a contract, and certain I am that neither of the parties so intended it.

In the pleadings I find a further defence that the contract was contrary to public policy; but the learned counsel for the defendants was unable to point out to me any grounds for such a contention other than those I have already discussed.

It follows from what I have said that, in my opinion, the plaintiff is entitled to recover the 100*l.* I therefore direct a verdict to be entered for the plaintiff for 100*l.*, and judgment accordingly with costs.

Judgment for the plaintiff.

Solicitors for plaintiff: *Field & Roscoe.*

Solicitors for defendants: *Rowcliffes, Rawle, & Co.*

(1) Law Rep. 2 Ex. at p. 150.

J. F. C.

C. A.
1892
June 30.

[IN THE COURT OF APPEAL.]

MAYOR, ALDERMEN, AND BURGESSES OF KINGSTON-UPON-HULL *v.* HARDING AND ANOTHER.

Principal and Surety—Laches of Employer—Contract that Works shall be well and truly executed—Failure to superintend Work—Dishonest Concealment of Defective Work—Certificate of Engineer—Payment of Retention Money—Alteration of Surety's Position.

A surety for a contractor is not discharged from liability, although his position has been altered by the conduct of the employer, where that conduct has been caused by a fraudulent act or omission of the contractor against which the surety has, by the contract of suretyship, guaranteed the employer.

The defendants, as sureties, contracted with the plaintiffs that the contractors for certain works would "well and truly" execute their contract. The contract gave to the plaintiffs a right of superintending the works through their engineer. It also provided for the retention of a certain per-centage of the contract price of the works until a final certificate should be given by such engineer, six months after his certificate of the completion of the work. The contractors did portions of the work in a defective manner, and fraudulently concealed the defective work so as to prevent its being discovered. The engineer ultimately gave his final certificate, upon which the retention money was paid to the contractors. In an action brought by the plaintiffs against the defendants as sureties, the jury found that the engineer's certificate for the work done had been obtained by fraud, but also that there was an omission on the part of the plaintiffs to properly superintend the work which led to the scamping of it:—

Held, that the mere non-exercise by the plaintiffs of their right of superintendence did not discharge the defendants from their liability as sureties; and also, that they were not discharged by the fact that the plaintiffs' engineer had given his final certificate, although the work was not properly done, or that the retention money had been thereupon paid, inasmuch as the mere giving of the certificate was not shewn to have altered the position of the defendants for the worse, and both that and the payment of the retention money were procured by a dishonest execution of the work against which the defendants had by their contract guaranteed the plaintiffs.

APPEAL from the judgment of Grantham, J., for the plaintiffs, and application to enter judgment for the defendants.

The action, which was tried with a jury, was against the defendants James Harding and Thomas Thacker, as sureties for the due performance of a contract for the construction of sewers, in respect of breaches of contract by the contractors. The contractors were also sued in the same action, and judgment was

recovered against them; but, although notice of appeal was given on their behalf, they did not appear on the appeal.

The facts were as follows. By the contract to which the contractors, the defendants their sureties, and the plaintiffs were parties, the contractors covenanted and agreed with the plaintiffs in substance that they would, within the time and in the manner, and subject to all the terms, stipulations, and conditions contained in the specification and tender thereto annexed, and the drawings referred to therein, execute, perform, fully complete, and maintain all the works in the said specification, tender, and drawings specified, described, or referred to, and would "well and truly execute, perform, observe, fulfil, and keep according to the true intent and meaning of these presents, and of the said specification, tender, and drawings, all things therein contained on the part of the contractors, and to be by them executed, performed, observed, fulfilled, and kept:" and the sureties separately covenanted and agreed with the plaintiffs that the covenant and agreement of the contractors should be "well and truly executed and performed." The specification provided, among other things, that the whole of the work should be set out and executed at the expense and on the responsibility of the contractors, and should be finished to the satisfaction of the plaintiffs' engineer; that the contractors should give or provide all necessary personal superintendence during the execution of the works, and should employ competent foremen to superintend the same during their progress; that the contractors and their sureties should not be released from their liabilities and obligations under the contract until after the expiration of six months from the date of the plaintiffs' engineer's certificate of completion, and not then unless all the conditions of the contract had been fulfilled to the satisfaction of such engineer; that the plaintiffs' engineer should have power to require any material or work to be properly tested as he might think fit, and to order any portion of the work to be taken up or undone at the expense of the contractors; but if on examination the work should be found to have been done according to the terms of the contract, the engineer should allow an extra charge to the contractors; that the contractors should maintain the works for the period of six

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months from the date of the plaintiffs' engineer's certificate of completion; that the works generally, and every part thereof, should be conducted and completed under the superintendence and to the satisfaction of the plaintiffs' engineer, and in all cases of difference of opinion as to the manner in which the work was executed, or as to the quality of the materials, or as to the meaning of the specification, or as to any matter, charge, or account, or otherwise, the decision of the plaintiffs' engineer should be final and binding on both parties; that advances on account of the price of the works at the rate of 90 per cent. of the value of the work executed should be made to the contractors as the works proceeded, upon the certificate of the plaintiffs' engineer; that the certificate of completion should be furnished on the completion of the whole of the works to be executed under the contract; and that the final certificate for the balance of 10 per cent. of the value of the work should be furnished six calendar months after the date of the engineer's certificate of completion, provided the works had been properly maintained by the contractors, and were executed to the satisfaction of the engineer, and that the contractors had complied with the whole of the stipulations of the specification, and that no previous certificate should be considered as proof or admission of the value, quality, or sufficiency of any work or material that might have been executed or supplied.

It appeared that the brickwork of the sewers contracted for had been executed in a very defective manner, so that the sewers were not water-tight, and were not fit for the purpose for which they were intended. The plaintiffs' engineer deputed the duty of superintending the works during their progress to a clerk of the works. The work had to be executed in two places, some distance apart, and, the ground between being level, the approach of the clerk of the works could be seen from some distance by those engaged in the execution of the works. As soon as he was observed coming, a preconcerted signal used to be given, and the brickwork which was being laid in a defective manner was covered up with earth before his arrival. The result was that he never observed anything wrong, and the defective character of the work was not discovered during the progress of the works.

The plaintiffs' engineer gave his certificate of completion, and more than six months afterwards his final certificate, upon which the remaining 10 per cent. of the contract price of the works was paid to the contractors. The defective character of the work having been subsequently discovered, the plaintiffs brought the action.

The jury found, in answer to questions left to them by the learned judge, that the contract was not complied with by the contractors; that the work was scamped and fraudulently done; that the plaintiffs were cheated by the way the work was done; that the certificates for the work done were obtained by fraud of the contractors; and that there was an omission on the part of the corporation to properly superintend the work, which led to the scamping of the work.

Upon these findings the learned judge gave judgment against the contractors at the trial, and subsequently, on further consideration, against the defendants the sureties, for damages to be ascertained by a reference.

Channell, Q.C., and *Montague Lush*, (*Hindmarsh*, with them), for the defendants. Upon the true construction of this contract the final certificate of the plaintiffs' engineer operated as a release of the sureties, even though obtained by the fraud of the contractors. Reading the provisions of the specification into the contract, it was an express term of the contract that the sureties should be released from liability by the engineer's certificate. The fraud of the contractors, by which the certificate was obtained, did not vitiate that certificate so as to deprive the sureties of the benefit of it under the contract. Again, the rule of law is, that a contract obtained by fraud is not void, but voidable only at the option of the party defrauded. If persons innocent of the fraud acquire rights under the contract before that option is exercised, they cannot be deprived of those rights. Here, assuming that the sureties would not be released under the contract by a certificate obtained by fraud, if avoided before their position was altered by reason of it, in this case their position has been altered by reason of the giving of the certificate; and, therefore, by the doctrines of the law of suretyship,

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independently of the terms of the contract, they are discharged. The plaintiffs, by their own acts or the acts of their servants, in giving the final certificate and paying over the retention fund, prejudiced the position of the sureties so as to render it inequitable that the contract of suretyship should be enforced against them. The certificate of the engineer ought not to have been given, the work not having been done according to contract, and no proper examination of it having been made. The giving of the certificate must be taken to have altered the position of the defendants, because they were left by it to suppose that the contractors had duly performed the contract. If they had not been led by it to suppose that all was right, they might have promptly taken steps to secure the proper performance of the work by the contractors. They would be entitled to indemnity from them, and might have made good the defective work themselves, and immediately brought an action against the contractors for the cost of doing so. They have been allowed from the time of the giving of the certificate till this litigation commenced to suppose that their liability was at an end. *Knights* v. *Wiffen* (1) shews that under such circumstances the position of the sureties must be taken to have been altered so as to discharge them. If they have lost anything of value in the way of possible steps to secure themselves, the value of what was lost cannot be measured, and it must be inferred that their position has been altered.

[BOWEN, L.J. Surely it cannot be that, as a matter of law, the position of the surety must be assumed to have been altered by the giving of the certificate? It must be a question of fact whether it was so altered or not.]

There was more here than the mere giving of the certificate. The plaintiffs paid over the retention money, which was not payable till the work was properly performed. By so doing they altered the position of the sureties. The provision for the retention by the corporation of that balance was by way of security for the due performance of the work, and when they paid it over the sureties' position was altered by losing a security for the due performance of the work in respect of which they had entered into the contract of suretyship. In *Calvert* v. *London Dock Co.* (2)

(1) Law Rep. 5 Q. B. 660. (2) 2 Keen, 638.

the surety was held relieved where the contract provided that the employer of the contractor should retain part of the contract money in his hands, and the employer paid it over to the contractor. The same principle was applied in *General Steam Navigation Co.* v. *Rolt* (1) and *Law* v. *East India Co.* (2)

Next, it is submitted that the contract between the corporation and the contractors was varied during the progress of the work so as to discharge the sureties. Under the contract the work was to be done under the superintendence and to the satisfaction of the engineer of the corporation; and the answers to the questions left to the jury shew that the corporation did not cause the work to be superintended during its progress, as they undertook to do. It is an obligation of the employer to exercise, for the benefit of the surety, all the protection which the employer had against the person guaranteed; and the surety is entitled to all the rights and remedies of the employer. Here, by the omission of the corporation to superintend the work according to the contract, the contract itself is altered in respect of the mode of executing the work; and the carrying on of the work in a way different to that provided by the contract is an alteration of the position of the surety which releases him: *M'Taggart* v. *Watson* (3); *Phillips* v. *Foxall* (4); *Sanderson* v. *Aston.* (5) All these cases recognise an obligation on the part of the employer in favour of the surety even beyond what may be found in the contract. [They also cited *Wulff* v. *Jay* (6); *Phillips* v. *Clagett* (7); *Petty* v. *Cooke* (8); *Dawson* v. *Lawes* (9); *Black* v. *Ottoman Bank.* (10)]

Forbes, Q.C., and *E. Tindal Atkinson, Q.C.* (*H. F. Manisty*, with them), for the plaintiffs. By the contract the sureties guaranteed that the contractors would "well and truly," that is honestly, perform their contract. That is an absolute obligation on the part of the sureties. Instead of doing the work well and truly, the contractors did it badly, and dishonestly concealed that they had so done it. The defendants cannot rely upon the engineer's

(1) 6 C. B. (N.S.) 550.
(2) 4 Ves. 824.
(3) 3 Cl. & F. 525.
(4) Law Rep. 7 Q. B. 666.
(5) Law Rep. 8 Ex. 73.
(6) Law Rep. 7 Q. B. 756.
(7) 11 M. & W. 84.
(8) Law Rep. 6 Q. B. 790.
(9) Kay, 280.
(10) 15 Moo. P. C. 472.

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certificate as a defence, because it was obtained by fraud. The contract cannot mean that a certificate which would not discharge the contractors should discharge the sureties. The liabilities of the sureties under the contract must have been intended to be coincident with those of the contractors.

The giving of the certificate and consequent payment of the retention money, even if they altered the position of the sureties, could not release them, because they were caused by fraudulent performance of the work by the contractors, which was the very thing against which the sureties had guaranteed the plaintiffs. The certificate is void for all purposes, if obtained by fraud, unless a third party has parted with money on the faith of it. It was not suggested at the trial that the position of the sureties had been altered. In *Petty* v. *Cooke* (1), which is the only case dealing with the effect of fraud upon the rights of the surety, the judgments of Blackburn, J., and Lush, J., establish that in order to discharge the surety there must be some inequitable act done by the principal; an innocent act done by the person who is entitled to the benefit of the guarantee cannot discharge the surety: see also *Pritchard* v. *Hitchcock*. (2) The payment of the retention money was procured by the fraud of the contractors as well as the certificate. It was part of the same transaction. The payment was the result of the dishonesty against which the sureties had given their guarantee.

With regard to the contention that the sureties have been released by reason of the negligence of the corporation in not supervising the work as it progressed, all the cases shew that negligence, even though it be gross negligence, will not discharge the surety. There must be what amounts to connivance by the employer. In *Mayor, &c., of Durham* v. *Fowler* (3), where all the cases on the subject are collected, it was held that mere laches of the obligee of a bond or mere passive acquiescence by him in acts which are contrary to the condition of the bond, is not sufficient to discharge the sureties. The sureties had no right by the contract to have the work superintended by the plaintiffs' engineer; the stipulation as to his superintendence

(1) Law Rep. 6 Q. B. 790. (2) 6 M. & G. 151.
(3) 22 Q. B. D. 394.

was merely inserted for the plaintiffs' protection. [They also cited *Guardians of Mansfield Union* v. *Wright* (1); *Newington* v. *Levy*. (2)]

Channell, Q.C., in reply.

LORD ESHER, M.R. In this case the plaintiffs sue the defendants now appealing as sureties upon a contract of suretyship. We must, therefore, first of all see in respect of what the defendants became sureties to the plaintiffs. They became sureties to the plaintiffs for the performance of a contract for the making of certain sewers by the contractors. The contract provides that the contractors shall "well and truly" do the work described in the plans and specifications. The work was certainly not well done by the contractors; whether it was truly done, we shall consider presently. Therefore, by the terms of the contract, the defendants are primâ facie liable. It was also a term of the contract that the liability of the sureties should continue until a final certificate of completion to his satisfaction was given by the plaintiffs' engineer, and that such certificate should be the only evidence as against the plaintiffs to shew that there had been such completion. Such certificate was in fact given. So the question is raised whether the contract into which the sureties have entered was that their liability should cease when the certificate was in fact given, or whether the real meaning was not that their liability should cease when such a certificate had been given by the engineer as would release the contractors. When one considers what the business meaning of such a contract is, it seems to me impossible to say that the true construction is that the mere fact of the engineer's giving a certificate, however it may have been procured, was to release the sureties. I think that the true meaning of the contract is that the sureties guaranteed that the contractors should well and truly do the work, and that their liability should cease when such a certificate had been given as would by implication have the effect of releasing the contractors. If that be the true meaning of the contract, then we have to see whether the certificate which was in fact given was such a certificate. If it was, then there would be no

(1) 9 Q. B. D. 683. (2) Law Rep. 5 C. P. 607.

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more liability on the part of the contractors to the corporation, and consequently no more liability on the part of the sureties.

The jury have found that this certificate was procured by the fraud of the contractors, and they have not challenged that finding, but remain liable under the judgment given against them in the action. Under these circumstances, it may be that it required some act of the corporation to avoid the certificate. It was at their option whether they would take advantage of the fraud of the contractors to do so or not. They brought their action against the contractors. The contractors could not successfully plead that they were released by the certificate, because it was procured by fraud; so this certificate did not release the contractors. But, if the contract of the sureties was that they were to be liable in respect of work badly done by the contractors, and that they should only be released from such liability by a certificate which should release the contractors, they have not escaped from the liability which was imposed upon them by reason of the works being badly done. Therefore, if we are to determine this case on the terms of the contract of suretyship itself, these sureties have no defence.

But then they say that there is a doctrine of law with regard to the liability of sureties which will release them, though they are not released by the terms of the contract. First of all they say, that a power was given to the corporation, and a duty was imposed upon them of exercising such power, which they did not fulfil; and that their failure to exercise such power and to perform such duty was the cause of the work's being badly done. That matter depends on the terms of the contract. The power, which it is said there was a duty to exercise, was the power of superintending the performance of the work. The question is, what is the meaning of the provision as to superintendence by the plaintiffs' engineer? It was contended that the meaning really was that the corporation were to direct in what manner the work should be done. When one considers the position of the corporation and the contractors and what the latter have to do, I think it is obvious that that was not the meaning. The corporation never meant to undertake to direct in what manner the work should be done, nor did the contractors agree to submit to their

directions. They were to do the work as they thought fit, and in the manner which their experience taught them was the best. The meaning of the provision was only that the corporation should have a right to observe and see how the work from time to time was being done. If that be the true view, it was merely an option given to the corporation whether they would superintend or not. Therefore, according to the contract, the fact that they did not exercise that option did not relieve the contractors from the obligation to do the work properly, and the contract of the sureties is that they shall well and truly execute the contract. Then comes the question whether, apart from the contract, by the law of suretyship the failure to exercise this option constituted such a breach of the duty owed by the corporation to the sureties as to release the sureties. The only thing that the corporation did, so far as this point is concerned, was not to exercise the option. It was a mere matter of passive inaction on their part. I do not think that the mere fact of non-superintendence of the work was a dereliction of any duty owed by the corporation to the sureties; and therefore it does not relieve the sureties as suggested by the defendants.

Then there is the further question whether, although the giving of the certificate did not relieve the sureties of liability by virtue of the terms of the contract, it does so relieve them, independently of the contract, by virtue of the law which governs the relations between sureties and those with whom they contract. First of all, does the mere giving of the certificate discharge the sureties? How can it discharge them? This question must be tested with relation to the effect of the certificate an hour after it is given. I am clearly of opinion that the mere fact of the certificate being given, even though it left the sureties to suppose that the work was properly done, did not alter the position of the sureties. It would be necessary to go further and prove that they had sustained some damage through it. The mere fact of the certificate being given cannot discharge the sureties by virtue of any doctrine of the law of suretyship.

We now come to another point urged on behalf of the sureties. It was said that the sureties were released by reason of the fact

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that the corporation were induced to pay over to the contractors the retention money, which, if retained by the corporation, would have been a fund to which the sureties might have looked in diminution of their liability; that, the position of the sureties being to that extent altered by the plaintiffs, by the doctrine of the law of suretyship they were discharged altogether. Did the payment over to the contractors of the retention money, procured as it was in this case, discharge the sureties? That question makes it necessary again to consider what the contract of the sureties was. It was that the work should be "well and truly" done. That seems to me equivalent to a contract that it should be well and honestly done. Here it was not done well and honestly. It was done dishonestly. The contractors worked in a dishonest manner, because they did the work badly, and, knowing they were doing it badly, they concealed the fact with a fraudulent mind from the person authorized by the corporation to exercise the right of superintending. This concealment was a breach by the contractors of a part of the contract, the performance of which by the contractors the sureties had guaranteed. The corporation paid this money to the contractors in consequence of a fraud against which the sureties had guaranteed the corporation. It seems impossible to say that according to any doctrine of the law of suretyship a surety is released by something which happens in consequence of that which amounts to a fraudulent breach of contract against which the surety has guaranteed the party with whom he has contracted. Therefore I think that the payment of the retention money to the contractors is not a fact on which the defendants can successfully rely in order to escape from the liability which they have undertaken. For these reasons I think that the appeal must be dismissed.

BOWEN, L.J. I am of the same opinion. The broad principle of law, which is the root of our decision, is, that a surety cannot claim to be discharged on the ground that his position has been altered by the conduct of the person with whom he has contracted, where that conduct has been caused by a fraudulent act or omission against which the surety by the contract of

suretyship has guaranteed the employer. This seems to be good sense, and I think it is good law. The case before us raises some questions of legal interest, which have been threshed out during the argument. It arises in this way. The plaintiffs, the Corporation of Hull, employed contractors, for whom the defendants became sureties. The engineer of the corporation, on the completion of the works, was to give a certificate; and it was provided by the specification that the contractors and their sureties should not be released till after six months from the date of the certificate of completion, and not then, unless all the conditions of the contract had been fulfilled to the satisfaction of the engineer; and the final certificate of the engineer was to be the only evidence binding on the corporation of the due completion of the works. When the six months had elapsed, and the final certificate was given, there would be a release of the defendants' liability. It was said that the final certificate had been given. It was, however, obtained by fraud, and the corporation, as against the persons who so obtained it, were unquestionably entitled, on discovery of the fraud, to elect within a reasonable time to avoid the certificate. As soon as they did so, it was gone as against the contractors, and all persons who had not previously acted upon the faith of it, so as to alter their position. It would no doubt stand, unless avoided; and, if the corporation had taken no steps to repudiate it, it would have been good enough; but it has been impugned by the corporation, from whose engineer it was obtained, in such a way as to entitle them to treat it as not binding upon them. Therefore, unless something has happened to alter the position of the sureties since the giving of the certificate, and before the corporation elected to treat it as void, the original giving of the certificate will not avail the sureties. The defendants' counsel put the case in two ways: first, they contended that the certificate could not be impugned as against the sureties, even although it was obtained by fraud of the contractors. According to the ordinary rules of law, I think it could be avoided as against the sureties, unless, before the corporation elected to avoid it, the position of the sureties had been so altered by reason of it as to make it inequitable that it should be avoided as against

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them. It was contended, secondly, that the position of the sureties was so altered. But, as it seems to me, the argument on that point breaks down. There is no proof that, since the giving of the certificate, the position of the sureties was altered in any such way as to make it inequitable as against them that the certificate should be treated as avoided. The question was never raised before the jury whether there was anything in the giving of the certificate, or any action taken by the sureties upon the faith of it, which altered their position for the worse. The defendants' counsel endeavoured to suggest that the certificate itself raised an estoppel. It might have done so, if the sureties had acted on the faith of it, but not otherwise. The case of *Knights* v. *Wiffen* (1) was said to establish the proposition of law that the mere statement itself, which the certificate contained, by inducing the sureties to do nothing as against the contractors, must amount in law to an alteration of the position of the sureties. It seems to me to be sufficient, in answer, to point out that the question, whether the position of the sureties has been altered, is a question of fact, not of law. There may be facts which would make it obviously impossible not to say that in law there is an alteration of the position of the surety. But that is not so here. The question must be one of fact. If the sureties had settled accounts with the contractors on the faith of the statement contained in the certificate, the case would have been different. If in *Knights* v. *Wiffen* (1) it was meant to go as far as the defendants' counsel contended, then I think that the decision must be taken to have been founded on an inference of fact drawn by the Court which would not bind us. That there may be some doubt whether such an inference was rightly drawn is suggested by the case of *Simm* v. *Anglo-American Telegraph Co.* (2), and in the 9th edition of Smith's Leading Cases, edited by Collins, J., and the late Mr. Arbuthnot, at p. 945. But, even assuming that the certificate did alter the position of the sureties, there still would remain the question whether it is not an answer to the argument based upon it, that it was obtained by a fraud of the contractors, against which the sureties had contracted. It seems to me clear that this would be an answer,

(1) Law Rep. 5 Q. B. 660. (2) 5 Q. B. D. 188.

upon the principle of law which I stated at the commencement of my judgment. But then it is said that, apart from the giving of the certificate, the payment over to the contractors of the retention money, which ought to have been retained till the work was properly completed according to the contract, discharged the sureties. No one can doubt that the sureties were entitled to the benefit of that fund as a security; and that it ought not to have been paid over until the work was properly completed, because, when it was paid over, the sureties would be deprived of the benefit of that fund. The argument for the defendants on this point might be reduced to the shape of a dilemma. Either a final certificate was given, or it was not. If it was given, the sureties—the defendants say—by the terms of the contract, were discharged. If it was not, why—the defendants argue—did the corporation pay over the retention money, and so deprive the sureties of their security? That seems, at first, a formidable way of putting the case; but the answer seems to me to be that the certificate has not been really given, because the corporation avoided it in time; and, though it is true that the retention money was paid over before it was due, and so the position of the sureties was altered to that extent, and they were deprived of a fund to the benefit of which they were entitled to look, that came about through the fraudulent execution of work, the honest execution of which the sureties guaranteed. This answer is to be found in the contract of suretyship itself, which provides, not in express terms, but by implication, that the sureties are not in such a case to be discharged in consequence of an act against which they themselves have guaranteed the corporation.

Another point was made which I ought to mention. It was said that by the contract the work was to be done under the superintendence of the engineer of the corporation, and that he did not superintend it, and so the position of the sureties was altered because the work in respect of which they had contracted to be sureties was a work to be done under his superintendence, whereas his superintendence was not afforded. The obvious remark on that is that there is no contract between the corporation and the sureties that the engineer of the corporation should superintend

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the work. The provision as to the work being done under the superintendence of the plaintiffs' engineer is intended to give to the plaintiffs the option of supervising. The mere non-exercise of that option does not bring the case within that class of cases where the neglect of the employer to enforce a right against the contractor has deprived the surety of advantage from the exercise of that right to which he was entitled. I can understand that, where the omission of the employer to do something deprives the surety of a right under the contract, or of the power to insist on its exercise, such an omission really affects a right belonging to the surety and so alters his position as to avoid the relation of suretyship. There is nothing of that kind in this case. The corporation did not part with their right to have the work superintended by their engineer; they only failed to exercise the option given to them of having it so superintended. The doctrine of law on this subject established in the case of *M'Taggart* v. *Watson* (1), and probably before that case, and expounded by subsequent authorities, particularly in the case of *Dawson* v. *Lawes* (2), and other cases referred to in *Mayor of Durham* v. *Fowler* (3), is this: mere omission on the part of the employer, mere passive acquiescence in acts which are improper on the part of the employé will not release the surety. If there be an omission to do some act which the employer has contracted with the surety to do, or to preserve some security to the benefit of which the surety is entitled, the case is different. There the omission would be one inconsistent with the relation between the surety and the person with whom he has contracted to be surety. Again, another kind of omission which would be an exception to the head of law which I have mentioned is such an omission as there was in *Phillips* v. *Foxall* (4), when the employer omitted to discharge a servant as soon as he found out acts of dishonesty on his part, and to give information of them to the surety. The decision in that case can only be explained in one of two ways, which lead to the same end, whichever path you traverse. One explanation is, that it is part of the understanding in that special contract of suretyship that the surety shall have information of

(1) 3 Cl. & F. 525.
(2) Kay, 280.
(3) 22 Q. B. D. 394.
(4) Law Rep. 7 Q. B. 666.

subsequent acts of dishonesty on the part of the person guaranteed, in order that he may insist either on determining the guarantee, or else that the servant shall be discharged. That was the view of the case taken by Cockburn, C.J., Lush, J., and Quain, J. If that is the true explanation, it is obvious that by not discharging the servant and not giving information to the surety, the latter is deprived of a contractual right. If the case is looked at from the point of view taken by Blackburn, J., viz., that the surety upon the default of the servant is entitled to the benefit of any right which the employer has against the servant, and that, as soon as the default happened, the employer was bound to exercise his right of discharging the servant for the protection of the interests of the surety, and that by not doing so he destroyed the right of the surety, the explanation is different, but it comes to the same thing; there is an omission which destroys the right of the surety, and which stands on the same footing as a positive act which destroys such right. If the right is one which the employer is bound to preserve in the interests of the surety, an omission to preserve it is a wrong. On the other hand, there are many cases which go to shew that mere non-exercise of an option of superintendence is not such an act of negligence or omission as destroys the surety's rights or places him in a worse position legally. For these reasons I agree that this appeal must be dismissed.

A. L. SMITH, L.J. After the judgments which have been delivered I have little to add. The first question to be determined is, against what have the defendants guaranteed the corporation? That depends on the true construction of the contract. By the contract it was agreed that the contractors should "well and truly," i.e., in my judgment honestly, execute the contract, or to put it in other words, the sureties guaranteed that the contractors would not scamp the work, and fraudulently hide it as it went on. That is what I understand to be the meaning of the contract. It must be remembered that the fraudulent acts of the contractors which are complained of are not frauds outside the contract, but frauds in the execution of the work which the sureties have contracted shall be "well and

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truly" performed. The defendant sureties are therefore primâ facie liable to the plaintiffs for the damages they have sustained by the malfeasance of the contractors. But it was said that, though that may be so, the clause in the specification, as to the release of the sureties from liability upon a final certificate being given, must be read together with the contract, and that, if that be done, it would appear that the sureties were discharged. It was argued that the meaning of that clause was that, on proof of the final certificate having in fact been given, the sureties were released. I do not think that is the true meaning of the clause. It is clear that that is not its meaning with regard to the contractors, and that, as against them, it is voidable as having been obtained by their fraud. That was not disputed at the bar. I think that the true reading of the clause is the same both as regards the sureties and as regards the contractors, viz., that, when a final certificate is given by the engineer which binds the corporation, then they both are discharged, but until that is done neither of them are discharged.

On the point that by the doctrine of law applicable to suretyship, apart from the contract, the giving of the certificate operated as a release of the sureties, I have nothing to add. The question raised upon the payment over of the retention money depends, in my opinion, on the construction of the contract with which I have already dealt. The sureties having guaranteed the corporation against that which I have before mentioned, they cannot now say that this payment operated to discharge them, when it was brought about by the very acts against which they had guaranteed the corporation. It is this construction of the guarantee which differentiates this case from many of the cases cited for the defendants, and particularly from the case of *Law* v. *East India Co.* (1)

On the point with regard to the failure of the plaintiffs to superintend this work, I have nothing to add, excepting that it is plain that the contract gave the option or privilege to the corporation in their own interests to superintend the works if they were so minded. In my judgment they were under no obligation to do so whether as regards the contractors or the sureties,

(1) 4 Ves. 824.

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and there is nothing in this point which avails the defendant sureties.

Appeal dismissed.

Solicitors for plaintiffs: *Cunliffes & Davenport, for R. Hill Dawe, Town Clerk of Hull.*

Solicitors for the defendant Harding: *Bell, Brodrick, & Gray, for J. T. & H. Woodhouse, Hull.*

Solicitors for defendant Thacker: *E. C. Rawlings, for A. E. Sykes, Hull.*

E. L.

[IN THE COURT OF APPEAL.]

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June 23; *July* 25.

DUCK *v.* MAYEU.

Release—Joint Tortfeasors—Discharge of One—Reservation of Claim against the Other—Covenant not to Sue.

A covenant not to sue one of two joint tortfeasors does not operate as a release of the other from liability.

APPEAL from the judgment of Day, J., at the trial without a jury.

The plaintiff, as the proprietor of the right of representation of a play called "Our Boys," sued the defendant under 3 & 4 Wm. 4, c. 15, s. 2, for representing such play, or causing the same to be represented, without the plaintiff's previous written consent, and claimed damages for the injury sustained by him, or in the alternative, one penalty of 40*s.*

The facts were as follows. A clergyman named Wills was desirous of getting up a theatrical performance for the benefit of a charity. He arranged with the defendant, Miss Mayeu, who was an actress, that for a lump sum she should procure a company for acting a play, of whom she was to be one, and should provide for the stage management, while he did all that was necessary in the way of hiring a place for the performance, and arranging for taking money at the doors, advertising, &c. "Our Boys" being the play selected for the performance, Mr. Wills asked the defendant to make terms with the plaintiff as to a licence for the performance of the play, which she accordingly did; and it was

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arranged that a licence should be granted for the sum of 1*l.* 1*s.* This arrangement was communicated to Mr. Wills by the defendant; but he omitted to pay for the licence, which was consequently never given. The play was, however, performed at the Wandsworth Town Hall, the defendant taking part in the performance. After the performance the plaintiff's solicitor wrote to Mr. Wills and also to the defendant, claiming the sum of 5*l.* 5*s.* in respect of the performance. It was arranged between the plaintiff's solicitor and Mr. Wills that the latter should pay 2*l.* 2*s.* in discharge of his personal liability. Mr. Wills accordingly sent to the plaintiff's solicitor a cheque for 2*l.* 2*s.*, and received from him a letter dated April 10, 1891, in the following terms: "Dear Sir,—'Our Boys.' I beg to acknowledge receipt of yours of the 9th, with cheque for 2*l.* 2*s.* 0*d.* inclosed, in respect of fee and costs, in full discharge of your personal liability in connection with Miss Marie Mayeu's performance of above at Wandsworth Town Hall, on 23rd January, 1891. This is, of course, without prejudice to my client's claim against Miss M. Mayeu."

The learned judge gave judgment for the plaintiff for 40*s.*

Brooke Little, for the defendant. The plaintiff had released Mr. Wills from liability. He and the defendant were in the position of joint tortfeasors, under the statute 3 & 4 Wm. 4, c. 15, s. 2, and consequently the release of the former destroyed the right of action against the latter: *Cocke* v. *Jennor* (1); *Brinsmead* v. *Harrison*. (2) (3)

Morton Smith, for the plaintiff. In *Brinsmead* v. *Harrison* (2) judgment had been recovered against one of the tortfeasors, and therefore the cause of action was satisfied.

Assuming that a release of one joint tortfeasor would discharge the other, in this case the two guineas were accepted from Mr. Wills only in respect of his personal liability, and the claim against the defendant was expressly reserved. The transaction,

(1) Hob. 66.

(2) Law Rep. 7 C. P. 547.

(3) The question was raised during the argument whether under the statute 3 & 4 Wm. 4, c. 15, s. 2, the defendant and Mr. Wills were in the position of joint tortfeasors, or had each committed a wholly independent tort under the statute; but, as will be seen, this point was left undecided by the judgment, and therefore the argument upon it is not given.

therefore, ought to be treated as merely amounting to a covenant not to sue Mr. Wills. It is well established that a covenant not to sue one of two joint debtors or contractors does not release the other. There is no reason why the same principle should not apply to joint tortfeasors: *Hutton* v. *Eyre* (1); *Mayor, &c., of Salford* v. *Lever* (2); *Willis* v. *De Castro.* (3)

Brooke Little, in reply, cited *Dufresne* v. *Hutchinson.* (4)

Cur. adv. vult.

July 25. The judgment of the Court (Lord Esher, M.R., Bowen, L.J., and A. L. Smith, L.J.), was delivered by

A. L. SMITH, L.J. The first point for determination is whether the defendant has established her defence, that the plaintiff had released her joint tortfeasor, the Rev. Mr. Wills, from a joint cause of action, so as to release her therefrom, or whether what she has established is merely that the plaintiff had covenanted not to sue Mr. Wills.

It is, we think, clear law, that a release granted to one joint tortfeasor, or to one joint debtor, operates as a discharge of the other joint tortfeasor, or the other joint debtor, the reason being that the cause of action, which is one and indivisible, having been released, all persons otherwise liable thereto are consequently released. The case of *Cocke* v. *Jennor* (5) is distinct upon the point, and there are many subsequent cases to the same effect.

It has also been held that a covenant not to sue one of two joint debtors does not operate as a release to the other joint debtor, *Hutton* v. *Eyre* (1), the reason being that the joint action is still alive. We have found no case in which it has been held that a covenant not to sue releases a joint tortfeasor; and in our judgment the principle upon which it has been held that such a covenant does not release a joint debtor applies to the case of a joint tortfeasor.

The question, then, is, does the document of April 10, 1891, operate as a release of the joint cause of action against Mr. Wills

(1) 6 Taunt. 289.
(2) [1891] 1 Q. B. 168.
(3) 4 C. B. (N.S.) 216.
(4) 3 Taunt. 117.
(5) Hob. 66.

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and the defendant, or only as a covenant not to sue Mr. Wills? It is as follows: "10 April, 1891. Dear Sir,—'Our Boys.' I beg to acknowledge receipt of yours of the 9th, with cheque for 2*l.* 2*s.* 0*d.* inclosed, in respect of fee and costs, in full discharge of your personal liability in connection with Miss Mayeu's performance of above at Wandsworth Town Hall on 23rd January, 1891. This is, of course, without prejudice to my client's claim against Miss M. Mayeu. Yours faithfully, W. M. Tilson." Tilson was solicitor for the plaintiff. A rule of construction for such a document was laid down by the Court of Queen's Bench in *Price* v. *Barker* (1), where it was held that, in determining whether the document be a release or a covenant not to sue, the intention of the parties was to be carried out, and, if it were clear that the right against a joint debtor was intended to be preserved, inasmuch as such right would not be preserved if the document were held to be a release, the proper construction, where this was sought to be done, was that it was a covenant not to sue, and not a release. In the case of *Bateson* v. *Gosling* (2) at Nisi Prius, the same canon of construction was applied, and it was held that, the release being, as it was, limited by a proviso reserving rights against the surety, it must be taken that it was a covenant not to sue, and not a release; and this ruling was unanimously upheld by the Court of Common Pleas, as reported in Law Rep. 7 C. P. p. 9.

For these reasons, we are of opinion that the document of April 10, 1891, is a covenant not to sue, and is not a release of the joint cause of action, and that the defendant's defence fails in fact.

It is unnecessary to consider the true construction of the statute 3 & 4 Wm. 4, c. 15.

In our judgment this appeal must be dismissed, and with costs.

Appeal dismissed.

Solicitor for plaintiff: *W. M. Tilson.*

Solicitors for defendant: *Steadman, Van Praagh, & Sims.*

(1) 4 E. & B. 760, at p. 777. (2) Law Rep. 7 C. P. 9.

E. L.

STORY, Appellant; SHEARD, Respondent. 1892 June 2.

Highway—Repair—Extraordinary Expenses—Extraordinary Traffic—Liability—Executor—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 *Vict. c.* 77), *s.* 23.

The proceedings which may be taken by a road authority, under s. 23 of the Highways and Locomotives (Amendment) Act, 1878, to recover in a summary manner the expenses of repairing a highway caused by extraordinary traffic thereon, are in the nature of an action for a personal tort, so that such proceedings cannot be taken against the executor of a person by whose order the extraordinary traffic was conducted.

Case stated under the Summary Jurisdiction Acts by two justices of the county of Derby.

The respondent, Mrs. Sheard, was summoned before the justices upon an information laid by the appellant, the county surveyor of Derbyshire, upon the instruction of the County Council of Derbyshire, to shew cause why she should not pay 295*l.* 3*s.* 5*d.*, the amount of extraordinary expenses certified by the surveyor to have been incurred by the county council, as the road authority of the district, during the year ending March 31, 1891, in repairing certain main roads in the parishes of Dronfield, Woodhouse, and Holmesfield, by reason of the damage caused by excessive weight passing along the same, and extraordinary traffic thereon—namely, certain locomotive engines drawing loaded trucks—which excessive weight and extraordinary traffic were conducted over the main roads in question by the order of John Sheard, deceased. The proceedings were taken under s. 23 of the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77). (1)

(1) Sect. 23: "Where by a certificate of their surveyor it appears to the authority which is liable or has undertaken to repair any highway, whether a main road or not, that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred by such authority in repairing such highway by reason of the damage caused by excessive weight passing along the same, or extraordinary traffic thereon, such authority may recover in a summary manner from any person by whose order such weight or traffic has been conducted the amount of such expenses as may be proved to the satisfaction of the Court having cognizance of the case to have been incurred by such authority by reason

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It was proved or admitted before the justices that damage had been done to the roads in question in the lifetime of John Sheard by traction engines and trucks belonging to him, and conducted over the roads by his order, during the year ending March 31, 1891; that he died on May 26, 1891, leaving the respondent his widow and sole executrix of his will; and that the county surveyor had given his certificate in respect of such damage on October 16, 1891.

The justices were of opinion that the proceedings could not be taken against the respondent, and dismissed the information and complaint, subject to the case stated.

The question for the opinion of the Court was: "Whether the proceedings for recovery of damages caused by extraordinary traffic mentioned in the Highways and Locomotives (Amendment) Act, 1878, s. 23, can be maintained against the personal representatives of a deceased person by whose order the traffic causing the damage is conducted, although the certificate required by that section has not been given in his lifetime; or whether the right of proceeding under the section ceases on the death of the person by whose order the damage is caused, whether such certificate was, or was not, given in such person's lifetime."

Carver, for the appellant. The claim of the county council is not a claim in respect of any personal tort committed by John Sheard, deceased. The Highways and Locomotives (Amendment) Act, 1878, recognizes the right to use locomotive engines on highways, and s. 23 provides in effect that the excessive use of the right must be paid for. The liability to pay is a debt created by the statute; it is not imposed by way of penalty. It is in the nature of a rate levied for the use of extraordinary traffic. That view is supported by the latter part of s. 23, which provides that "any person against whom expenses are or may be

of the damage arising from such weight or traffic as aforesaid:

"Provided that any person against whom expenses are or may be recoverable under this section may enter into any agreement with such authority as is mentioned in this section for the payment to them of a composition in respect of such weight or traffic, and thereupon the persons so paying the same shall not be subject to any proceedings under this section."

recoverable under this section" may agree with the road authority for the payment to them of a composition in respect of excessive weight or extraordinary traffic. The fact that the expenses are recoverable on information does not make them a penalty. The expenses of paving new streets, under s. 150 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), are recovered by the local authority on information; but it cannot be contended that the liability of the frontagers is imposed by way of penalty. It is conceded that an action will not lie against executors on a penal statute; but s. 23 of the Highways and Locomotives (Amendment) Act, 1878, creates a debt merely, payment of which it was intended should be enforceable against executors.

T. E. Ellison, for the respondent, was not heard.

POLLOCK, B. (after stating the facts). It was contended before the magistrates that these proceedings, taken against the respondent as executrix of John Sheard, were in the nature of an action for a tort committed by him in his lifetime, and that the respondent was not liable, because the right of proceeding to recover the expenses caused by the excessive weight and extraordinary traffic, which was taken over the road in question by the order of John Sheard, died with him, and the magistrates had no power to make an order against his estate, or a personal order against his executrix. Upon that contention the magistrates gave their determination against the present appellant, and I am of opinion that they were right. What is the nature and character of these proceedings taken under s. 23 of the Highways and Locomotives (Amendment) Act, 1878? Are they proceedings in the nature of an action of contract for a debt, or in the nature of an action for a personal tort? If they are in the nature of an action of tort only, it is clear that they cannot be taken against the executrix of the person who committed the tort, because the rule, "Actio personalis moritur cum personâ," applies. I do not stop to inquire whether the rule be a good or bad one; it is a rule by which we are clearly bound. Now, I cannot doubt, looking at the character and history of the subject-matter of the legislation, that these are proceedings in the nature

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of an action of tort. Somebody has used the road in a manner which is excessive. Long before the passing of the Act, an indictment for a nuisance would lie in respect of such excessive user, and it is clear that the subject-matter of the proceeding by indictment would be tort. As locomotive engines became more commonly used on roads, the legislature thought fit to provide that, instead of going through the form of an indictment at common law in each case, the damage caused to the road by excessive user might be recovered by summary proceedings on an information founded upon the certificate of the surveyor. In no sense is the liability imposed by s. 23 like a debt payable, or a rate in respect of the excessive user; nor are the proceedings under that section a mere mode of assessment as to the amount of a debt or a rate. Until the passing of the Act no proceedings could be taken except in tort, and I think that is a sufficient reason for our decision in this case. I am of opinion that our judgment should be for the respondent.

VAUGHAN WILLIAMS, J. I am of the same opinion.

Judgment for the respondent. Leave to appeal was given.

Solicitors for the appellant: *Winn, Holmes, & Winn, for Busby, Clerk of the Peace for Derbyshire.*

Solicitors for the respondent: *Geare, Son, & Pease, for Wake & Son, Sheffield.*

W. A.

THE QUEEN *v.* McKENZIE AND OTHERS. 1892 *July* 18, 20.

Criminal Law — Certiorari — Conviction insufficiently describing Offence — Conspiracy and Protection of Property Act, 1875 (38 & 39 *Vict. c.* 86), *s.* 7.

By s. 7 of the Conspiracy and Protection of Property Act, 1875, a penalty is imposed on any person who wrongfully and without legal authority, "with a view to compel any other person to abstain from doing . . . . any act which such other person has a legal right to do," follows him in a disorderly manner, with two or more other persons, in any street or road.

The defendant was summarily convicted under the section, the conviction stating that he wrongfully and without legal authority followed the informant in a disorderly manner, with two or more other persons, in certain streets, "with a view to compel him to abstain from doing acts which he had a legal right to do":—

Held, that these acts ought to have been specified in the conviction, and that it must be quashed.

RULE NISI to the justices of Sunderland, calling upon them to shew cause why a writ of certiorari should not issue to bring up and quash a conviction by them of one Johnson Henderson, under s. 7 of the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86) (1), on the grounds "(1.) that the summons and conviction ought to have specified the acts, with a view to compel the informant to abstain from doing which, the defendant followed the informant;

(2.) That some of the convicting justices were interested and biassed."

It appeared that the informant was a district superintendent of the Shipping Federation, Limited, which was involved in disputes with the National Amalgamated Seamen's and Firemen's Union, of which the defendant was an officer. On May 19 the defendant was summoned before a Court of summary

(1) By the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 7: "Every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do, or abstain from doing, wrongfully and without legal authority . . . . (2.) Persistently follows such other person about from place to place, or . . . . (5.) Follows such other person, with two or more other persons, in a disorderly manner, in or through any street or road, shall on conviction thereof by a Court of summary jurisdiction be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labour."

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jurisdiction, the summons charging him that he, on April 16, 1892, "unlawfully, with a view to compel the informant, J. T. Lawrence, to abstain from doing or to do acts which the informant had a legal right to do or abstain from doing, wrongfully and without legal authority persistently followed the informant about from place to place, and followed the informant, with two or more other persons, in a disorderly manner, in or through High Street and West Sunnyside."

The defendant elected to be dealt with summarily, and the justices found, as they stated in their affidavit, that on the date in question the defendant led a large crowd of persons who, in a disorderly manner, followed the informant through the streets, "with a view to compel him to abstain from following his occupation as the agent of the Shipping Federation, Limited, an act which he had a legal right to do," and they convicted the defendant, and sentenced him to fourteen days' imprisonment.

The conviction stated that the defendant "unlawfully did, with a view to compel one J. T. Lawrence to abstain from doing acts which he the said J. T. Lawrence had a legal right to do, wrongfully and without legal authority follow the said J. T. Lawrence, with two or more other persons, in a disorderly manner, in and through certain streets—to wit, High Street and West Sunnyside."

Lawson Walton, Q.C., and *Mallinson*, for the justices, shewed cause. The summons and conviction sufficiently disclose the offence, and it is not necessary that they should set out the specific acts which the defendant intended by his conduct to compel the informant to abstain from doing: Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 39 (1). If, however, there is any omission, the Court has power to amend the conviction: 12 & 13 Vict. c. 45, s. 7; *Reg.* v. *Biggins.* (1)

As to the second ground, it is admitted that the justices had no pecuniary interest, and there is no evidence of any real bias on their part. [They referred to *Reg.* v. *Farrant* (2) and *Leeson* v. *General Council of Medical Education.* (3)]

(1) 5 L. T. (N.S.) 605. (2) 20 Q. B. D. 58. (3) 43 Ch. D. 366.

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Temperley, for the informant.

Asquith, Q.C., and *Scott Fox*, in support of the rule. The conviction must shew every ingredient in the offence. The gist of the offence created by s. 7 of the Conspiracy and Protection of Property Act, 1875, is the view with which the acts there specified are done. There was no offence unless the defendant's acts were done with a view to compel the informant to abstain from doing some act which he had a legal right to do, and that act ought to have been specified in the conviction. There is no power to amend, since there is nothing to shew that the justices were justified in convicting the defendant.

As to the second ground, the justices were biassed, since three of them were practically shipowners, holding shares in ships which were insured in companies which were members of the Shipping Federation.

Cur. adv. vult.

July 20. COLLINS, J. I am of opinion in this case that the rule should be made absolute on the first ground on which it was moved, namely, that the summons and conviction ought to have specified the acts which the informant had a legal right to do, and which the defendant by his conduct intended to compel him to abstain from doing. The conviction does not altogether follow the wording of the summons, and it sets forth that the defendant, with a view to compel the informant "to abstain from doing acts" which the informant had a legal right to do, unlawfully followed him with other persons in a disorderly manner. When the section constituting the offence is looked at, it is obvious that the defect is one of substance and not one merely of form. Sect. 7 of the Act says, that every person who, with a view to compel any other person to abstain from doing any act which such other person has a legal right to do, follows such person with two or more other persons in a disorderly manner in any street or road, is guilty of an offence under the Act. The legislature might, had it chosen to do so, have constituted the mere following a person in a disorderly manner an offence. It has not so chosen, and it is clear that the gist and pith of the offence here is not the following in a disorderly manner but the

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doing so with a view to compel the informant to abstain from doing some act which he had a legal right to do. If the defendant could have shewn that he had had no such view, or that the informant had had no legal right to do the act which the defendant had desired to compel him to abstain from doing, that would have been a good answer to the charge. The conviction, therefore, does not address itself to the real pith of the offence, and it does not seem to me to comply with either the terms or the substance of the statute.

But then it is said that it might nevertheless be cured by amendment. I think that that might be so if it was clearly shewn to us that the offence constituted by the Act was in fact proved before the magistrates. It is a good test to see what the magistrates had actually before them. As it seems to me, the laxity which is expressed in the conviction is also apparent in the mode in which they dealt with the offence charged. The affidavit of the justices says that it was proved that the defendant had followed the informant in a disorderly manner and with two or more persons "with a view to compel him to abstain from following his occupation as the agent of the Shipping Federation, Limited, an act which he had a legal right to do." They appear to have treated that as one act. Obviously, the following of an occupation must consist of a large number of acts, and I think, unless the prosecution could specify some particular act which the defendant desired to compel the informant to abstain from doing, and which his disorderly conduct was intended to compel the informant to abstain from doing, it is impossible to say that he was properly convicted of an offence under the section. It seems, therefore, to me that any amendment of the conviction is out of the question here, as the facts proved at the hearing do not point to any such specific act.

Another ground of objection was taken to the conviction, on which, although it is unnecessary for us to decide it, I should wish to say a few words. It was contended that the magistrates were biassed in their decision. There are, I think, no facts to support that contention. It is admitted that they had no pecuniary interest in the matter, but it is said that they were disqualified on the ground of bias because three of their number

owned shares in shipping companies, which were insured in an association, which was a member of the Shipping Federation, of which the informant was an official. If it could have been shewn that these magistrates were by themselves or their agents the real prosecutors in the case, it would be very different; but I cannot think that under the circumstances there was any bias, or likelihood of bias, on their part. The facts are not nearly so strong as those in the case of *Leeson* v. *General Council of Medical Education* (1), where the Court of Appeal held that there was no bias. I think, therefore, that the second ground is not made out; but, as I have said, I think that the conviction must be quashed on the first ground of objection.

BRUCE, J. I am of the same opinion. It is quite clear that the gist of the offence is the following the person with a view to compel him to do or abstain from doing some act which he has a legal right to abstain from doing or to do, and the magistrates in order to convict must be satisfied that the defendant acted with such a view. It is necessary, I think, that the conviction should set out some particular and definite act which the defendant's conduct was intended to compel the informant to abstain from doing, and which the informant had a legal right to do. It was formerly necessary in order to render a conviction good to set out in it all the facts constituting the offence in order that the offence itself might appear on the conviction. But by s. 39 (1) of the Summary Jurisdiction Act, 1879, it is provided that the description of any offence in the words of the Act creating the offence shall be sufficient in law. I am inclined to think, therefore, that if this conviction had followed the words of the Act, even although it did not specify the particular act which the informant was intended to be prevented from doing, it would be sufficient. But the conviction here speaks of acts and not of "an act," and therefore it does not follow the words of the section. That seems to be a sufficient variance and a variance in substance, and it is plain that the magistrates had not any particular act present to their minds. As to the second point, I quite agree with the view taken by Collins, J.

(1) 43 Ch. D. 366.

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There is absolutely no evidence that the magistrates were disqualified on the ground of bias. In order to shew that, it must be apparent that they had some substantial interest in the result of the proceedings. I agree, however, that this rule must be made absolute to quash the conviction on the first ground.

Rule absolute.

Solicitors for justices: *Tufnell Southgate & Son, for Barker, Sunderland.*

Solicitors for informant: *Botterell & Roche.*

Solicitor for defendant: *J. J. Bentham, Sunderland.*

A. P. P. K.

Applied. JOYCE *v.* MOTOR SURVEYS. [1948] 1 Ch. 252

C. A.

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Jan. 20; *May* 26.

[IN THE COURT OF APPEAL.]

RATCLIFFE *v.* EVANS.

Defamation—Words not Actionable per se—Publication of Falsehoods about a Business—Special Damage—Evidence—General Loss of Business.

In an action for words not actionable per se, but constituting an untrue statement maliciously published about the plaintiff's business, which statement is intended or reasonably likely to produce, and in the ordinary course of things does produce, a general loss of business as distinct from the loss of particular known customers, evidence of such general loss of business is admissible, and sufficient to support the action.

MOTION to enter judgment for the defendant, or for a new trial, by way of appeal from the judgment entered by Mr. Commissioner Bompas, Q.C., in an action tried with a jury at the Chester Summer Assizes, 1891.

The statement of claim in the action alleged that the plaintiff had for many years carried on the business, at Hawarden in the county of Flint, of an engineer and boiler-maker under the name of "Ratcliffe & Sons," having become entitled to the goodwill of the business upon the death of his father, who, with others, had formerly carried on the business as "Ratcliffe & Sons"; that the defendant was the registered proprietor, publisher, and printer of a weekly newspaper called the *County Herald*, circulated in Flintshire and some of the adjoining counties, and that the plaintiff

had suffered damage by the defendant falsely and maliciously publishing and printing of the plaintiff in relation to his business, in the *County Herald*, certain words set forth which imported that the plaintiff had ceased to carry on his business of engineer and boiler-maker, and that the firm of Ratcliffe & Sons did not then exist.

At the trial the learned commissioner allowed the statement of claim to be amended by adding that "by reason of the premises the plaintiff was injured in his credit and reputation, and in his said business of an engineer and boiler-maker, and he thereby lost profits which he otherwise would have made in his said business." The plaintiff proved the publication of the statements complained of, and that they were untrue. He also proved a general loss of business since the publication; but he gave no specific evidence of the loss of any particular customers or orders by reason of such publication. In answer to questions left to them by the commissioner, the jury found that the words did not reflect upon the plaintiff's character, and were not libellous; that the statement that the firm of Ratcliffe & Sons was extinct was not published bonâ fide; and that the plaintiff's business suffered injury to the extent of 120*l.* from the publication of that statement. The commissioner, upon those findings, gave judgment for the plaintiff for 120*l.*, with costs.

The defendant appealed.

Bowen Rowlands, Q.C., and *E. H. Lloyd*, for the appellant. The learned commissioner ought to have entered judgment for the defendant. The evidence given by the plaintiff of a general loss of business ought not to have been admitted. In order to support the action, which is not an action for slander of the plaintiff in the way of his business, but an action on the case, special damage must have been alleged and proved. If the plaintiff had brought his action for slander, he must have proved special damage by calling witnesses to say that they had withdrawn their custom from him. He ought not to be in a better position by having brought an action on the case in the nature of an action for slander of title. In such an action there must, in order to support it, be an express allegation of some particular

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damage: *Malachy* v. *Soper*. (1) The analogy of actions for slander in which damage is the gist of the action applies. If the slander is not actionable per se, then, if the plaintiff may prove general damage, he can recover because the defendant's statement has been repeated by others; but the decisions in *Ward* v. *Weeks* (2) and *Dixon* v. *Smith* (3) are founded on the principle that the defendant cannot be made liable for repetitions of the statement he has made. It is conceded that in a certain class of cases—of which *Evans* v. *Harries* (4) may be one—where from the nature of the case the plaintiff cannot give evidence of special or particular damage, the jury may infer such damage from the fact that the plaintiff's business has gone; but *Evans* v. *Harries* (4) differs from the present case, because there was there a personal imputation on the plaintiff; it was never treated as an action on the case. In *Riding* v. *Smith* (5), also, though the Court held that special damage must be proved in order to support the action, they thought, under the circumstances of that case, that it might be proved by giving general evidence of the falling off of the plaintiff's business, without shewing that particular persons, who had heard the defendant's statements, had ceased to deal with the plaintiff. The principle of *Malachy* v. *Soper* (6) should be applied here. [They also referred to *Western Counties Manure Co.* v. *Lawes Chemical Manure Co.* (7); *Clarke* v. *Morgan*. (8)]

F. Marshall, for the respondent. The evidence of the plaintiff's general loss of business was admissible, and it was evidence of special damage sufficient to support the action. The defendant's statements were published in a newspaper which was widely read in Wales, and the natural consequence would be to prevent persons who were, or intended to be, customers of the plaintiff, and who read the statements, from giving him further orders.

From the nature of the case, it was impossible that the plaintiff could give other than general evidence of his loss of business; and this comes within the class of cases in which it has been held

(1) 3 Bing. N. C. 371, judgment of Tindal, C.J., at p. 382.
(2) 7 Bing. 211.
(3) 5 H. & N. 450.
(4) 1 H. & N. 251; 26 L. J. (Ex.) 31.
(5) 1 Ex. D. 91.
(6) 3 Bing. N. C. 371
(7) Law Rep. 9 Ex. 218.
(8) 38 L. T. Rep. (N.S.) 354.

that such evidence is sufficient evidence of special damage to support the action. *Malachy* v. *Soper* (1) is not in point here. The Court did not intend to lay down a general rule; they thought that, under the circumstances of that case, there was no sufficient allegation or proof of special damage. [He referred also to *Thomas* v. *Williams* (2); *Dicks* v. *Brooks*. (3)]

Cur. adv. vult.

May 26. The following judgment of the Court (Lord Esher, M.R., Bowen, and Fry, L.JJ.), was read by

BOWEN, L.J. This was a case in which an action for a false and malicious publication about the trade and manufactures of the plaintiff was tried at the Chester assizes, with the result of a verdict for the plaintiff for 120*l*. Judgment having been entered for the plaintiff for that sum and costs, the defendant appealed to this Court for a new trial, or to enter a verdict for the defendant, on the ground, amongst others, that no special damage, such as was necessary to support the action, was proved at the trial. The injurious statement complained of was a publication in the *County Herald*, a Welsh newspaper. It was treated in the pleadings as a defamatory statement or libel; but this suggestion was negatived, and the verdict of the jury proceeded upon the view that the writing was a false statement purposely made about the manufactures of the plaintiff, which was intended to, and did in fact, cause him damage. The only proof at the trial of such damage consisted, however, of evidence of general loss of business without specific proof of the loss of any particular customers or orders, and the question we have to determine is, whether in such an action such general evidence of damage was admissible and sufficient. That an action will lie for written or oral falsehoods, not actionable per se nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage, is established law. Such an action is not one of libel or of slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse, analogous to an action for

(1) 3 Bing. N. C. 371. (2) 14 Ch. D. 864.
(3) 15 Ch. D. 22.

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slander of title. To support it, actual damage must be shewn, for it is an action which only lies in respect of such damage as has actually occurred. It was contended before us that in such an action it is not enough to allege and prove general loss of business arising from the publication, since such general loss is general and not special damage, and special damage, as often has been said, is the gist of such an action on the case. Lest we should be led astray in such a matter by mere words, it is desirable to recollect that the term "special damage," which is found for centuries in the books, is not always used with reference to similar subject-matter, nor in the same context. At times (both in the law of tort and of contract) it is employed to denote that damage arising out of the special circumstances of the case which, if properly pleaded, may be superadded to the general damage which the law implies in every breach of contract and every infringement of an absolute right: see *Ashby* v. *White*. (1) In all such cases the law presumes that *some* damage will flow in the ordinary course of things from the mere invasion of the plaintiff's rights, and calls it general damage. Special damage in such a context means the particular damage (beyond the general damage), which results from the particular circumstances of the case, and of the plaintiff's claim to be compensated, for which he ought to give warning in his pleadings in order that there may be no surprise at the trial. But where no actual and positive right (apart from the damage done) has been disturbed, it is the damage done that is the wrong; and the expression "special damage," when used of this damage, denotes the actual and temporal loss which has, in fact, occurred. Such damage is called variously in old authorities, "express loss," "particular damage": *Cane* v. *Golding* (2); "damage in fact," "special or particular cause of loss": *Law* v. *Harwood* (3); *Tasburgh* v. *Day*. (4)

The term "special damage" has also been used in actions on the case brought for a public nuisance, such as the obstruction of a river or a highway, to denote that actual and particular loss which the plaintiff must allege and prove that he has sustained

(1) 2 Ld. Raym. 938; 1 Sm. L. C. 9th ed. p. 268, per Holt, C.J.

(2) Sty. 169.

(3) Cro. Car. 140.

(4) Cro. Jac. 484.

beyond what is sustained by the general public, if his action is to be supported, such particular loss being, as is obvious, the cause of action: see *Iveson* v. *Moore* (1); *Rose* v. *Groves*. (2) In this judgment we shall endeavour to avoid a term which, intelligible enough in particular contexts, tends, when successively employed in more than one context and with regard to different subject-matter, to encourage confusion in thought. The question to be decided does not depend on words, but is one of substance. In an action like the present, brought for a malicious falsehood intentionally published in a newspaper about the plaintiff's business—a falsehood which is not actionable as a personal libel, and which is not defamatory in itself—is evidence to shew that a general loss of business has been the direct and natural result admissible in evidence, and, if uncontradicted, sufficient to maintain the action? In the case of a personal libel, such general loss of custom may unquestionably be alleged and proved. Every libel is of itself a wrong in regard of which the law, as we have seen, implies general damage. By the very fact that he has committed such a wrong, the defendant is prepared for the proof that some general damage may have been done. As is said by Gould, J., in *Iveson* v. *Moore* (1), in actions against a wrong-doer a more general mode of declaring is allowed. If, indeed, over and above this general damage, further particular damage is under the circumstances to be relied on by the plaintiff, such particular damage must of course be alleged and shewn. But a loss of general custom, flowing directly and in the ordinary course of things from a libel, may be alleged and proved generally. "It is not special damage"—says Pollock, C.B., in *Harrison* v. *Pearce* (3)—"it is general damage resulting from the kind of injury the plaintiff has sustained." So in *Bluck* v. *Lovering* (4), under a general allegation of loss of credit in business, general evidence was received of a decline of business presumably due to the publication of the libel, while loss of particular customers, not having been pleaded, was held rightly to have been rejected at the trial: see also *Ingram* v. *Lawson*. (5)

(1) 1 Ld. Raym. 486.
(2) 5 M. & G. 613.
(3) 32 L. T. (O.S.) 298.
(4) 1 Times L. R. 497.
(5) 6 Bing. N. C. 212.

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Akin to, though distinguishable in a respect which will be mentioned from, actions of libel are those actions which are brought for oral slander, where such slander consists of words actionable in themselves and the mere use of which constitutes the infringement of the plaintiff's right. The very speaking of such words, apart from all damage, constitutes a wrong and gives rise to a cause of action. The law in such a case, as in the case of libel, presumes, and in theory allows, proof of general damage. But slander, even if actionable in itself, is regarded as differing from libel in a point which renders proof of general damage in slander cases difficult to be made good. A person who publishes defamatory matter on paper or in print puts in circulation that which is more permanent and more easily transmissible than oral slander. Verbal defamatory statements may, indeed, be intended to be repeated, or may be uttered under such circumstances that their repetition follows in the ordinary course of things from their original utterance. Except in such cases, the law does not allow the plaintiff to recover damages which flow, not from the original slander, but from its unauthorized repetition: *Ward* v. *Weeks* (1); *Holwood* v. *Hopkins* (2); *Dixon* v. *Smith*. (3) General loss of custom cannot properly be proved in respect of a slander of this kind when it has been uttered under such circumstances that its repetition does not flow directly and naturally from the circumstances under which the slander itself was uttered. The doctrine that in slanders actionable per se general damage may be alleged and proved with generality must be taken, therefore, with the qualification that the words complained of must have been spoken under circumstances which might in the ordinary course of things have directly produced the general damage that has in fact occurred. *Evans* v. *Harries* (4) was a slander uttered in such a manner. It consisted of words reflecting on an innkeeper in the conduct of his business spoken openly in the presence of divers persons, guests and customers of the inn—a floating and transitory class. The Court held that general evidence of the decline of business was rightly receivable. "How," asked Martin, B., "is a public-house keeper, whose only

(1) 7 Bing. 211.
(2) Cro. Eliz. 787.
(3) 5 H. & N. 450.
(4) 1 H. & N. 251.

customers are persons passing by, to shew a damage resulting from the slander, unless he is allowed to give general evidence of a loss of custom?" *Macloughlin* v. *Welsh* (1) was an instance of excommunication in open church. General proof was held to be rightly admitted that the plaintiff was shunned and his mill abandoned, though no loss of particular customers was shewn. Here the very nature of the slander rendered it necessary that such general proof should be allowed. The defamatory words were spoken openly and publicly, and were intended to have the exact effect which was produced. Unless such general evidence was admissible, the injury done could not be proved at all. If, in addition to this general loss, the loss of particular customers was to be relied on, such particular losses would, in accordance with the ordinary rules of pleading, have been required to be mentioned in the statement of claim: see *Ashley* v. *Harrison*. (2) From libels and slanders actionable per se, we pass to the case of slanders not actionable per se, where actual damage done is the very gist of the action. Many old authorities may be cited for the proposition that in such a case the actual loss must be proved specially and with certainty: *Law* v. *Harwood*. (3) Many such instances are collected in the judgments in *Iveson* v. *Moore* (4), where, although there was a difference as to whether the general rule had been fulfilled in that particular kind of action on the case, no doubt was thrown on the principle itself. As was there said—in that language of old pleaders which has seen its day, but which connoted more accuracy of legal thought than is produced by modern statements of claim—"damages in the 'per quod,' where the 'per quod' is the gist of the action, should be shewn certainly and specially." But such a doctrine as this was always subject to the qualification of good sense and of justice. Cases may here, as before, occur where a general loss of custom is the natural and direct result of the slander, and where it is not possible to specify particular instances of the loss. *Hartley* v. *Herring* (5) is probably a case of the kind, although it does not appear from the report under

(1) 10 Ir. L. Rep. 19.
(2) 1 Esp. 50.
(3) Cro. Car. 140.
(4) 1 Ld. Raym. 486.
(5) 8 T. R. 130.

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what circumstances, or in the presence of whom, the slanderous words were uttered. But if the words are uttered to an individual, and repetition is not intended except to a limited extent, general loss of custom cannot be ordinarily a direct and natural result of the limited slander: *Dixon* v. *Smith* (1); *Hopwood* v. *Thorn*. (2) The broad doctrine is stated in Buller's Nisi Prius, p. 7, that where words are not actionable, and the special damage is the gist of the action, saying generally that several persons left the plaintiff's house is not laying the special damage. Slanders of title, written or oral, and actions such as the present, brought for damage done by falsehoods, written or oral, about a man's goods or business, are similar in many respects to the last-mentioned class of slanders not actionable in themselves. Damage is the gist of both actions alike, and it makes no difference in this respect whether the falsehood is oral or in writing: *Malachy* v. *Soper*. (3) The necessity of alleging and proving actual temporal loss with certainty and precision in all cases of the sort has been insisted upon for centuries: *Lowe* v. *Harewood* (4); *Cane* v. *Golding* (5); *Tasburgh* v. *Day* (6); *Evans* v. *Harlow*. (7) But it is an ancient and established rule of pleading that the question of generality of pleading must depend on the general subject-matter: *Janson* v. *Stuart* (8); *Lord Arlington* v. *Merricke* (9); *Grey* v. *Friar* (10); *Westwood* v. *Cowne* (11); *Iveson* v. *Moore*. (12) In all actions accordingly on the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by

(1) 5 H. & N. 450.
(2) 19 L. J. (C.P.) 95.
(3) 3 Bing. N. C. 382.
(4) W. Jones. 196.
(5) Sty. 176.
(6) Cro. Jac. 484.
(7) 5 Q. B. 624.
(8) 1 T. R. 754.
(9) 2 Saund. 412, n. 4.
(10) 15 Q. B. 907; see Co. Litt. 303 d.
(11) 1 Stark. 172.
(12) 1 Ld. Raym. 486.

which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry. The rule to be laid down with regard to malicious falsehoods affecting property or trade is only an instance of the doctrines of good sense applicable to all that branch of actions on the case to which the class under discussion belongs. The nature and circumstances of the publication of the falsehood may accordingly require the admission of evidence of general loss of business as the natural and direct result produced, and perhaps intended to be produced. An instructive illustration, and one by which the present appeal is really covered, is furnished by the case of *Hargrave* v. *Le Breton* (1), decided a century and a half ago. It was an example of slander of title at an auction. The allegation in the declaration was that divers persons who would have purchased at the auction left the place; but no particular persons were named. The objection that they were not specially mentioned was, as the report tells us, "easily" answered. The answer given was that in the nature of the transaction it was impossible to specify names; that the injury complained of was in effect that the bidding at the auction had been prevented and stopped, and that everybody had gone away. It had, therefore, become impossible to tell with certainty who would have been bidders or purchasers if the auction had not been rendered abortive. This case shews, what sound judgment itself dictates, that in an action for falsehood producing damage to a man's trade, which in its very nature is intended or reasonably likely to produce, and which in the ordinary course of things does produce, a general loss of business, as distinct from the loss of this or that known customer, evidence of such general decline of business is admissible. In *Hargrave* v. *Le Breton* (1) it was a falsehood openly promulgated at an auction. In the case before us to-day, it is a falsehood openly disseminated through the press —probably read, and possibly acted on, by persons of whom the plaintiff never heard. To refuse with reference to such a subject-matter to admit such general evidence would be to misunderstand and warp the meaning of old expressions; to depart from, and not to follow, old rules; and, in addition to all this, would involve an

(1) 4 Burr. 2422.

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absolute denial of justice and of redress for the very mischief which was intended to be committed. It may be added that, so far as the decision in *Riding* v. *Smith* (1) can be justified, it must be justified on the ground that the Court (rightly or wrongly) believed the circumstances under which the falsehood was uttered to have brought it within the scope of a similar principle. In our opinion, therefore, there has been no misdirection and no improper admission of evidence, and this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for appellant: *Hamlin & Co., for Cartwright & Sons, Chester.*

Solicitors for respondent: *Chester & Co., for Henry Jolliffe, Chester.*

W. A.

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[IN THE COURT OF APPEAL.]

BAWDEN *v.* THE LONDON, EDINBURGH, AND GLASGOW ASSURANCE CO.

Insurance—Accident—Principal and Agent—Knowledge of Agent imputed to Principal—Misstatement in Proposal.

B. effected an insurance with the defendant company through their agent against accidental injury. The proposal for the insurance contained a statement by the assured that he had no physical infirmity, and that there were no circumstances that rendered him peculiarly liable to accidents, and it was agreed that the proposal should form the basis of the contract between him and the company. By the terms of the policy, the company agreed to pay the insured 500*l.* on permanent total disablement, and 250*l.* on permanent partial disablement—the policy stating that by permanent total disablement was meant, inter alia, "the complete and irrecoverable loss of sight to both eyes," and by permanent partial disablement was meant, inter alia, "the complete and irrecoverable loss of sight in one eye."

At the time when he signed the proposal for the insurance the assured had lost the sight of one eye, a fact of which the defendants' agent was aware, though he did not communicate it to the defendants.

The assured during the currency of the policy met with an accident, which resulted in the complete loss of sight in his other eye, so that he became permanently blind:—

Held, that it must be taken, first, that the assured had sustained a complete

(1) 1 Ex. D. 91.

loss of sight to both eyes within the meaning of the policy; secondly, that the knowledge of the defendants' agent was under the circumstances the knowledge of the defendants, and that they were liable on the policy for 500*l*.

APPLICATION by the defendants for a new trial of the action, or that judgment might be entered for them.

At the trial before Lord Coleridge, C.J., at the Cumberland Assizes in March, 1892, it appeared that the action was brought by the administratrix of William Bawden, deceased, to recover the amount secured to the deceased by a policy of insurance against accidental injury granted to him by the defendant company. Bawden lived in Cumberland, and in August, 1888, one John Quin, who was a local agent or canvasser for the company, and who received commission from them upon insurances which he procured for them, called upon Bawden and invited him to effect an insurance against accidental injury, and Bawden consented to do so. Bawden was an illiterate man, and was almost unable to read or write, but he could write his name. He had many years previously met with an accident which had entirely destroyed the sight of one of his eyes, and Quin was aware that he had only one eye. Quin produced a printed form of proposal and filled up the blanks in it at Bawden's dictation, and Bawden then signed his name to it. The proposal was dated August 25, 1888. It was upon a printed form, which was headed "Accident Proposal," followed by the name and address of the company. Then came a number of questions to be answered by the person making the proposal (as to his age, profession or occupation, &c.), with a blank opposite to each question for the answer. Then came blanks for the insertion of the sum for which the policy was to be granted, and the amount of the premium. Then came the following clause:—

"*Other particulars.*

"I have not had paralysis or fit of any kind. I am in good health, free from disease, not ruptured, and have no physical infirmity, nor are there any circumstances that render me peculiarly liable to accidents . . . .

"I request the London, Edinburgh, and Glasgow Assurance Co., Limited, to grant me a policy, subject to their usual conditions,

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insuring compensation in the event of accidental injury, in accordance with the above particulars, and further particulars (if any) at back hereof; and I agree that the statements contained in this proposal shall form the basis of the contract between me and the company. The risk of the company not to commence until the proposal has been accepted by the directors, and the premium demanded by them paid by me."

In the margin of this clause was the following note:—"If not strictly applicable, particulars of any deviation must be given at back." At the bottom of the paper was printed "agency," followed by a blank, and "agent," followed by another blank. The first blank was filled up with "Whitehaven," and the second with Quin's name. The answers to the questions, and the filling up of all the blanks, were written by Quin. No "particulars of deviations" were given on the back.

Quin did not, so far as appeared, inform the company that Bawden had only one eye. The company accepted the proposal, and issued a policy to Bawden. The policy was dated August 28, 1888. It was called, "Policy of Assurance against Accidental Injury." It stated the "sum assured" to be: "On death or permanent total disablement, 500*l.*; on permanent partial disablement, 250*l.*; on temporary total disablement, 3*l.* per week;" and the "yearly premium" to be 2*l.* 1*s.*, payable on August 28 in each year.

The policy contained a recital that Bawden (the assured) had, "by a proposal and declaration in writing, dated the 25th August, 1888, proposed to effect an assurance against accidental injury" with the company, "which proposal and declaration it is agreed shall be the basis of the contract between the assured and the company."

The policy witnessed that "the company doth hereby agree and declare that, if at any time during the said period of one year, or at any time thereafter whilst the assured shall duly pay the above-mentioned premium according to the provisions and conditions of this policy, the assured shall sustain any bodily injury, caused by accidental external and visible means, within the meaning hereof, and the conditions hereto, then—

"(A.) If the direct effect of such injury shall, within three

calendar months from the occurrence of such injury, occasion the death or permanent total disablement (according to the provisions and conditions of this policy) of the assured, the company shall pay to the assured, or to his legal personal representatives, the full sum of 500*l.*

"(B.) If the direct effect of such injury shall, within three calendar months from the occurrence of such injury, occasion the permanent partial disablement (according to the provisions and conditions of this policy) of the assured, the company shall pay to the assured the sum of 250*l.*"

There was a proviso "that this policy, and the assurance thereby effected, are and shall be subject and liable to the conditions and notices indorsed hereon, in the same manner as if the same were respectively repeated and incorporated in this policy; and it is hereby agreed that the said several conditions and notices are conditions precedent to any claim under or by virtue of this policy, or to any right of action thereon."

On the back of the policy were indorsed a number of conditions, and the following "Notices":—

"PERMANENT TOTAL DISABLEMENT.—By this term is meant the loss of both hands or of both feet, or the loss of a hand and a foot, or the complete and irrecoverable loss of sight in both eyes.

"PERMANENT PARTIAL DISABLEMENT.—By this term is meant the loss of one hand, the loss of one foot, or the complete and irrecoverable loss of sight in one eye."

The policy was renewed from time to time. On May 6, 1891, Bawden met with another accident, in consequence of which, within three months, he entirely lost the sight of his second eye, and became totally blind, and on August 30, 1891, he died. Before his death he made a claim upon the company for 500*l.*, for permanent total disablement. The company resisted the claim, on the ground that the proposal on which the policy was based contained a misstatement. After the death of Bawden, this action was brought by his administratrix, claiming payment of 500*l.* by the company.

At the trial the company gave no evidence as to the extent of Quin's authority as agent.

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The Lord Chief Justice directed the jury that the company were, through their agent Quin, affected with knowledge of the fact that Bawden was a one-eyed man. The jury found a verdict for the plaintiff for 500*l.*, and judgment was entered accordingly.

May 12, 13. *Sir Charles Russell, Q.C., Ashton Cross,* and *F. Dodd,* for the defendants. The defendants are entitled to judgment. The statements made in the proposal were to be the basis of the contract of insurance. The statement that the assured had no physical infirmity was untrue.

[LORD ESHER, M.R. Must not the knowledge of the defendants' agent that the assured had lost the sight of one eye be imputed to the defendants?]

Assuming that the agent did know that, he was not the defendants' agent to make contracts. He was merely their agent to get certain printed forms of proposal signed, and to forward them to the company; he had no authority to waive any of the conditions contained in the printed forms. He was not such an agent that his knowledge was the knowledge of the defendants. He may have been guilty of a breach of moral duty in allowing the assured to sign the proposal as it stood, or in not communicating to the defendants the fact that the assured had only one eye; but the question is whether he was guilty of any breach of duty towards the assured as the defendants' agent; for, if not, the defendants cannot be affected by his knowledge: *Linford* v. *The Provincial Horse and Cattle Insurance Co.* (1); *Acey* v. *Fernie.* (2) The case of *Wing* v. *Harvey* (3) is distinguishable. There the company had received the premiums for years. The policy is void altogether, because the statement in the proposal, which formed the basis of the contract, was untrue: *Thomson* v. *Weems* (4); *Blackburn, Low & Co.* v. *Vigors.* (5)

At any rate, the plaintiff is only entitled to recover as for a partial permanent disablement; and therefore the damages ought to be reduced to 250*l.* According to the definition in the policy,

(1) 34 Beav. 291.
(2) 7 M. & W. 151.
(3) 5 D. M. & G. 265.
(4) 9 App. Cas. 671.
(5) 12 App. Cas. 531, 538.

the loss of the sight of one eye is only partial disablement. "Loss" means loss after the effecting of the insurance. The assured only lost the sight of one eye after the execution of the policy. The argument for the plaintiff must go to this extent, that if the company had compensated the assured for the loss of one eye, and had paid him 250*l.*, he could, when he lost the second eye, recover 500*l.* In other words, he could recover in the whole 250*l.* more than the amount of the policy. The company are not liable for 500*l.*, unless the loss of both eyes is the direct effect of the accident.

Gully, Q.C., and *Henry*, for the plaintiff, were not called upon.

LORD ESHER, M.R. We have to apply the general law of principal and agent to the particular facts of this case. The question is, what was the authority of such an agent as Quin? His authority is to be gathered from what he did. He was an agent of the company. He was not like a man who goes to a company and says, I have obtained a proposal for an insurance; will you pay me commission for it? He was the agent of the company before he addressed Bawden. For what purpose was he agent? To negotiate the terms of a proposal for an insurance, and to induce the person who wished to insure to make the proposal. The agent could not make a contract of insurance. He was the agent of the company to obtain a proposal which the company would accept. He was not merely their agent to take the piece of paper containing the proposal to the company. The company could not alter the proposal; they must accept it or decline it. Quin, then, having authority to negotiate and settle the terms of a proposal, what happened? He went to a man who had only one eye, and persuaded him to make a proposal to the company, which the company might then either accept or reject. He negotiated and settled the terms of the proposal. He saw that the man had only one eye. The proposal must be construed as having been negotiated and settled by the agent with a one-eyed man. In that sense the knowledge of the agent was the knowledge of the company. The policy was upon a printed form which contained general words applicable to more than one state of circumstances, and we have to apply those words to the

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particular circumstances of this case. When the policy says that permanent total disablement means "the complete and irrecoverable loss of sight in both eyes," it must mean that the assured is to lose the sight of both eyes by an accident after the policy has been granted. The contract was entered into with a one-eyed man, and in such a case the words must mean that he is to be rendered totally blind by the accident. That, indeed, would be the meaning in the case of a man who had two eyes. If the accident renders the man totally blind, he is to be paid 500*l.* for permanent total disablement. Quin, being the agent of the company to negotiate and settle the terms of the proposal, did so with a one-eyed man. The company accepted the proposal, knowing through their agent that it was made by a one-eyed man, and they issued to him a policy which is binding upon them, as made with a one-eyed man, that they would pay him 500*l.* if he by accident totally lost his sight, i.e., the sight of the only eye he had. In my opinion, the plaintiff is entitled to recover 500*l.* for the total loss of sight by the assured as the direct effect of the accident.

LINDLEY, L.J. I am of the same opinion. The case turns mainly upon the position of Quin. What do we know about him? The company have given us no information about the terms of his agency. In the printed form of proposal he is described as the agent of the company for Whitehaven, and it is admitted that he was their agent for the purpose of obtaining proposals. What does that mean? It implies that he sees the person who makes the proposal. He was the person deputed by the company to receive the proposal, and to put it into shape. He obtains a proposal from a man who is obviously blind in one eye, and Quin sees this. This man cannot read or write, except that he can sign his name, and Quin knows this. Are we to be told that Quin's knowledge is not the knowledge of the company? Are they to be allowed to throw over Quin? In my opinion, the company are bound by Quin's knowledge, and they are really attempting to throw upon the assured the consequences of Quin's breach of duty to them in not telling them that the assured had only one eye. The policy must, in my opinion, be

treated as if it contained a recital that the assured was a one-eyed man. The 500*l.* is to be payable in case of the "complete and irrecoverable loss of sight in both eyes" by the assured. If the assured has only one eye to be injured, this must mean the total loss of sight. Within the true meaning of the policy, as applicable to a one-eyed man, I think the plaintiff is entitled to recover 500*l.*

KAY, L.J. I agree. The defendants are a limited joint stock company, and the principal question is, whether the knowledge of their agent is to be imputed to them. I am clearly of opinion that it is. The agent, when he obtained the proposal, knew that this man had only one eye. It appears on the face of the proposal that Quin was the agent of the company for the Whitehaven district. What was he agent for? The company have given no evidence about this, but we cannot have better evidence than what the agent actually did. It was his duty to obtain proposals for assurances, and to send them to the company. It was his duty to get the form of proposal filled up and signed by the proposer, and to see that this was done correctly. Then he goes to a man who has obviously only one eye—he knows that he has only one eye—and he induces him to sign a proposal. The agent fills up the blanks in the proposal in his own handwriting, and it is sent in to the company. In the margin of the form is printed this note: "If not strictly applicable, particulars of any deviations must be given at back," which must mean that if the printed statements in the form are not strictly applicable to the particular case, the respects in which they are not so are to be stated on the back of the proposal. If Quin had performed his duty to the company, who would have written at the back of the proposals the "deviations" in the case of Bawden? I think it was Quin's duty to do this, and to point out to Bawden that without it the form would not be properly filled up. So far as we know, Quin did not convey to the company his knowledge of the fact that Bawden had only one eye; and it is argued that, the policy having been entered into by the company, and the premiums paid to them for some time, the policy is either void, or the company are only liable for a partial disablement of the

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assured. How is it possible for us to say that the knowledge of Quin is not to be imputed to the company? That knowledge was obtained by him when he was acting within the scope of his authority, and it must be imputed to the company. This is an answer to the argument that the policy is to be treated as void, because the statements in the proposal are not accurate. In my opinion, the condition that the statements in the proposal are to form the basis of the contract does not apply at all, because knowledge is to be imputed to the company of the fact that Bawden had only one eye.

Then it is said that the plaintiff can recover only for partial, not for total, permanent disablement. But, treating the company as knowing that Bawden had only one eye, how ought the policy to be construed? The material words are, "complete and irrecoverable loss of sight in both eyes;" and, in my opinion, they ought to be construed as meaning that the company are to pay 500*l.* in case the assured completely loses his sight by means of an accident. This is what has happened in the present case; and, therefore, in my opinion, the plaintiff is entitled to recover 500*l.*

Application refused.

Solicitors for plaintiff: *Wilkins, Blyth & Co., agents for W. H. Chapman, Whitehaven.*

Solicitors for defendants: *Wynne-Baxter & Keeble.*

W. L. C.

SMITH *v.* KING. 1892 *May* 10.

Infant—Contract—Debt incurred during Infancy—Action brought after attaining Majority—Bill of Exchange given to compromise Action—Ratification or New Promise—Infants' Relief Act, 1874 (37 & 38 *Vict. c.* 62), *s.* 2.

By the Infants' Relief Act, 1874 (37 & 38 Vict. c. 62), s. 2, "no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age."

The defendant, during infancy, became, jointly with two others, indebted to a firm of brokers, who brought an action against them after the defendant had attained his majority to recover the amount of the debt. The action was compromised on the terms that defendant should give two acceptances for 50*l.* each, and one of his co-defendants an acceptance for 80*l.*, the other defendant being discharged from the action. One of the bills given by the defendant to the brokers was indorsed by the latter to the plaintiff, who had acted as their solicitor in the action, and who took the bill with notice of the circumstances under which it was given:—

Held, that the transaction merely amounted to a promise made by the defendant after full age to pay a debt contracted during infancy, or to a ratification made by him after full age of a promise or contract made during infancy; and was, therefore, avoided by the operation of s. 2 of the Infants' Relief Act, 1874.

APPEAL from a decision of the assistant judge of the Mayor's Court, sitting without a jury.

The action was brought to recover the amount of a bill of exchange given by the defendant to Green, Somerset & Co., of which the plaintiff claimed to be a bonâ fide holder for value. The defendant had during his infancy entered into certain speculative transactions on the Stock Exchange through Green, Somerset & Co., who were a firm of brokers, the result of the transactions being that a sum of 547*l.* was owing in respect of differences from the defendant and two others to the brokers. After the defendant came of age the brokers brought an action against them to recover the 547*l.*, and the present plaintiff acted as the solicitor for the brokers in the action, in which the infancy of the defendant was pleaded as a defence. Before the action came on for trial, a compromise was effected, by which the

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defendant was to give the brokers two acceptances for the sum of 50*l.* each, at six and nine months respectively; Nicholls, a second defendant, was to give a bill for 80*l.*, and the third defendant was released from the action. One of the bills of exchange given by the defendant was subsequently indorsed over for value by the brokers to their solicitor, the present plaintiff, who now sued upon it. The learned assistant judge found that the plaintiff took the bill of exchange with notice of all the circumstances of the case; but held that he was nevertheless entitled to recover the amount. The defendant appealed. (1)

Poley, for the defendant. The conduct of the defendant amounted to no more than a ratification of a contract void on the ground that it was entered into during infancy; it was at the most a new promise to pay a portion of an old debt contracted while he was an infant. In such a case the Court will go behind the compromise in order to see the nature of the original debt, as in bankruptcy the Court will go behind a judgment which has been made the foundation of bankruptcy proceedings: *Ex parte Kibble, In re Onslow* (2), where the Court inquired into the consideration for a judgment, and held that it amounted merely to a ratification of a bill of exchange given during infancy to the creditor who had obtained judgment by default in an action upon the bill. In the Irish case of *Belfast Banking Co.* v. *Doherty* (3), it was held that an indorsee for value could maintain an action against the acceptor of a bill of exchange given for a debt incurred during infancy, but accepted by the latter after attaining twenty-one; but in that case the plaintiff was a bonâ fide holder for value without notice, and the Court further thought that, as between the immediate parties to it, the bill would be a promise or ratification within the meaning of the section, upon which no action would lie. In the present case, the plaintiff took the

(1) By 37 & 38 Vict. c. 62 (the Infants' Relief Act, 1874), s. 2, "No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age."

(2) Law Rep. 10 Ch. 373.

(3) 4 Law Rep. Ir. 124.

bill with notice of the facts, and can stand in no better position than his indorsers, who were immediate parties to it.

Trevor White, for the plaintiff. The compromise was not a mere ratification or promise within the meaning of the statute; it was an entirely new and independent contract, entered into after the defendant came of age; it released not merely the defendant himself, but also his co-defendants, from the action brought against them, and this release formed a sufficient consideration for the defendant's wholly new and independent promise. In actions for breach of promise of marriage, where the original promise was made during infancy, it is a question for the jury whether, since attaining twenty-one, there has been a fresh absolute promise to marry, or merely a ratification of the original promise made during infancy: *Northcote* v. *Doughty* (1); *Ditcham* v. *Worrall*. (2) The promise relied on in the present case is as much a fresh, independent promise as a promise to marry; and the question whether there has been such a promise is one of fact for the tribunal at the trial of the action.

DAY, J. I am of opinion, though I have felt some doubt during the argument, that the judgment of the learned assistant judge must be reversed, and the ground of my decision is that the transaction was simply a renewal of the promise made by the defendant when an infant. The defendant had incurred what, but for the fact of his infancy, would have been legal liabilities; he had pleaded his infancy in an action brought against him, and that plea, if true (as it admittedly was), was a complete bar to the action. What he then did, however, was this. He, in effect, consented to a verdict against himself for 100*l.*, to be secured by two bills of exchange for 50*l.* each, and these bills he gave in accordance with the terms of this compromise. One of these notes came into the hands of his creditors' solicitor, who now sues him on it. Can he recover?

The objection is taken that the provisions of s. 2 of the Infants' Relief Act, 1874, afford a complete defence to the action, for it is said that the transaction in the present case was either a new promise made after full age to pay a debt contracted during

(1) 4 C. P. D. 385. (2) 5 C. P. D. 410.

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infancy, or else a ratification after full age of a promise or contract made during infancy. It is urged in answer, that there was an entirely new consideration; but that is provided for by the section, and affords no answer to the objection; and it further seems to me that the only substantial consideration for the bills was the release of the defendant from his old liability, from which, however, he was protected by his infancy. I think, therefore, that the defendant is entitled to the relief afforded by the Infants' Relief Act, 1874, and that this appeal must be allowed.

CHARLES, J. I am of the same opinion. It is clear upon the finding of the learned assistant judge that the plaintiff can be in no better position than the brokers, and this point must be decided as though the latter were the plaintiffs in this action. The action is brought to recover the amount of two bills of exchange given by the defendant in pursuance of, and in order to carry out the terms of, a compromise or verdict by consent, and I think that the defendant is not liable in the action by reason of the provisions of s. 2 of the Infants' Relief Act, 1874. We have in the present case, first, a promise by the defendant during his minority to pay a sum of money; secondly, a promise by him after attaining full age to pay a portion of that sum. It is said that the forbearance of the then plaintiffs to carry on their action afforded a new consideration, and a good consideration, for the defendant's promise to pay the bills of exchange. In my opinion, however, that case is amply provided for by s. 2 of the Act. I think that there was here a new consideration for the defendant's promise; but the section expressly says that no action shall be brought upon such a promise, even where there is a new consideration for it. The case of *Ex parte Kibble, In re Onslow* (1) seems strongly to support that view. In that case a plaintiff had obtained judgment by default for a debt incurred by the defendant during infancy, and the judgment had been followed by a judgment debtor summons and a petition for adjudication in bankruptcy. The Court inquired into the consideration for the judgment, and, finding that it was a debt con-

(1) Law Rep. 10 Ch. 373.

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tracted during infancy, held that s. 2 applied to the case, and dismissed the petition for adjudication. In delivering judgment in that case, Mellish, L.J., says: "I am of opinion that that section applies to all contracts made by an infant, provided the ratification is made after the passing of the Act; and that it is to be understood as saying that a debt contracted in infancy shall not in future in any case form a valid consideration on which an action can be brought. The statute in effect places a debt contracted during infancy in the same position as a gambling debt; and a bill of exchange given for a gambling debt cannot form the ground for an action." The principle of that decision governs this case, and the appeal must be allowed.

Appeal allowed; leave to appeal.

Solicitor for plaintiff: *W. A. Smith.*
Solicitor for defendant: *H. H. Cooke.*

W. J. B.

[IN THE COURT OF APPEAL.]

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July 13, 14; *Aug.* 2.

HESELTINE *v.* SIMMONS.

Bill of Sale—Validity of—Form in Schedule, Deviation from—Untrue Statement of Consideration—Term for Defeazance of Security—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 8, 9.

An untrue statement of the consideration for which a bill of sale was given does not constitute a deviation from the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882; and therefore it does not wholly avoid the instrument under s. 9 of that Act, but only renders it void in respect of the personal chattels comprised therein under s. 8.

A collateral agreement between the grantor and grantee of a bill of sale, given by way of security for money advanced, that the bill of sale shall not be made available until the grantee has exhausted certain other securities for the advance, is not a term for the "defeazance" of the security; and the non-insertion of such agreement in the bill of sale does not make it void under s. 9 of the Bills of Sale Act (1878) Amendment Act, 1882, as not being in accordance with the form in the schedule.

APPEAL from the judgment of Denman, J., at the trial without a jury.

The action was brought by the grantor against the grantee of a bill of sale, given as a security for payment of money

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advanced, for an injunction to restrain the defendant from seizing the goods comprised therein, and for an order that the instrument should be delivered up to be cancelled as being void.

The defendant counter-claimed the amount due on a covenant by the plaintiff for payment of the money advanced with interest contained in the bill of sale.

The facts were, so far as material, as follows: The bill of sale, which on the face of it appeared to be in conformity with the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882, was expressed to be given in consideration of the sum of 400*l.* paid by the grantee to the grantor, which the grantor covenanted to repay with interest, by instalments. It was found by the learned judge upon the evidence, that the money was not in reality advanced to the plaintiff, but to his father. He also found that it was agreed between the plaintiff and the defendant at the time when the bill of sale was given that it should not be made available against the plaintiff until the defendant had attempted to realize and had exhausted certain other securities given for the advance. No stipulation to that effect, however, was inserted in the bill of sale. It appeared from the evidence that the defendant had not exhausted these other securities. The learned judge gave judgment for the plaintiff upon the claim declaring that the bill of sale was wholly void, and also upon the counter-claim.

1892. July 13, 14. *Bosanquet, Q.C.*, and *Holmes Poulter*, for the defendant. The bill of sale was held by the learned judge to be absolutely void under s. 9 of the Bills of Sale Act, 1882, on two grounds: first, because the consideration was not truly stated; secondly, because a term for defeazance of the security was not inserted. With regard to the first point, s. 9 relates only to the form of the instrument. A bill of sale is not void under that section, because, though it follows the form in the schedule, the facts stated in it are not true: *Simmons* v. *Woodward* (1). Sect. 8 expressly states what is to be the consequence if the consideration is not truly stated, viz., that the bill of sale shall be void in respect of the personal chattels comprised

(1) [1892] A. C. 100.

therein. It is really inconsistent with that section that the more sweeping consequence indicated by s. 9 should follow.

With regard to the second point, the agreement that the lender should have recourse to other securities first is not, properly speaking, a defeazance. It is a purely collateral agreement which forms no part of the bill of sale. It is not part of the same bargain as is contained in the bill of sale. Such a stipulation might possibly be a condition, the non-insertion of which would avoid the registration under s. 10 of the Bills of Sale Act, 1878, the effect of which would be to make the bill of sale void under s. 8 as to the personal chattels comprised therein: see *Counsell* v. *London and Westminster Loan and Discount Co.* (1); but it is not a defeazance, and it is submitted with regard to this point also that the bill of sale is none the less in conformity with the form on account of this stipulation not being inserted, and therefore cannot be void under s. 9.

Avory, and *A. H. Carrington*, for the plaintiff. The bill of sale in this case is void under s. 9 of the Bills of Sale Act, 1882, as not being in accordance with the form in the schedule.

There are clearly cases in which a bill of sale may be void both under s. 8 and under s. 9 of the Act; for instance, where the consideration is not stated at all. *Parsons* v. *Brand* (2) shews that the matters in brackets in the form in the schedule are part of the form; so that if they are not filled in the form is not followed. Therefore, the statement of the consideration is part of the form. It would be absurd that, if the consideration is not stated at all, the bill of sale should be void under s. 9, but if it is untruly stated it should not. An untrue statement of the consideration is the same as an omission to state it. On this construction, there would not be any inconsistency such as is suggested between ss. 8 and 9. Sect. 8 applies to all bills of sale, because s. 8 of the Act of 1878 is repealed; but s. 9 applies only to bills of sale given as security for money. The decision in *Simmons* v. *Woodward* (3) does not really touch this point. What was decided there was that the description of the grantee was in fact sufficient. Therefore, it was unnecessary to decide

(1) 19 Q. B. D. 512. (2) 25 Q. B. D. 110.
(3) [1892] A. C. 100.

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whether, if it had not been so, the bill of sale would have been void as not being in accordance with the form. The House of Lords really only overruled the view of the Court of Appeal (1) on a question of fact, not of law. This is not the case of a merely defective statement of the consideration. The statement is absolutely false, and therefore it is no description at all of the real consideration.

[They cited on this point: *Charlesworth* v. *Mills* (2); *Thomas* v. *Kelly* (3); *Swift* v. *Pannell* (4); *In re Standard Manufacturing Co.* (5); *Hughes* v. *Little* (6); *Sharpe* v. *McHenry* (7); *Simpson* v. *Charing Cross Bank.* (8)]

Again, the bill of sale is void because, there being a term agreed to for the defeazance of the security, viz., that the other securities should be exhausted first, this was not inserted in the bill of sale; and therefore it is not in accordance with the form, which, by the words in brackets, requires that such terms shall be inserted. It may be said that this is not a defeazance of the security in the strict technical sense of the term. It is submitted that the word "defeazance" is not used by the Act in its strict sense. It means anything by which the security may become inoperative. The words are, "any terms as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance or defeazance of the security." It is submitted that those words would include a condition the result of which may be that the security is defeated.

Bosanquet, Q.C., in reply.

Cur. adv. vult.

1892. Aug. 2. The judgment of the Court (Lord Esher, M.R., Bowen, L.J., and Kay, L.J.) was delivered by

KAY, L.J. This action is brought by the grantor of a bill of sale seeking to have it cancelled. The defendant counterclaims for the amount due upon the covenant in the bill of sale. Judgment has been given for the plaintiff upon claim and

(1) [1891] 1 Ch. 464.
(2) [1892] A. C. 231.
(3) 13 App. Cas. 506.
(4) 24 Ch. D. 210.
(5) [1891] 1 Ch. 627.
(6) 18 Q. B. D. 32.
(7) 38 Ch. D. 427.
(8) 34 W. R. 568.

counter-claim. The defendant, the grantee of the bill of sale, appeals.

The contention of the plaintiff is, that the bill of sale is void under s. 9 of the Act of 1882, because it is not in accordance with the form given in the schedule to that Act.

On the face of the bill of sale no deviation from that form can be pointed out. But it is said that is not enough. Although apparently in complete accordance, it is shewn by evidence, (1.) that the consideration is not truly stated, because the amount was not lent to the plaintiff, but to his father, and (2.) that the bill of sale omits a condition upon the faith of which it was executed, viz., that it should not be enforced until all other securities and remedies of the grantee had been exhausted.

The question, therefore, is whether s. 9 of the Act of 1882 contains anything requiring accuracy of statement of the consideration, or requiring a statement of the whole bargain. I will deal with the two objections separately.

First, does the untrue statement of the consideration avoid the bill of sale under s. 9. Sect. 8 of the Act of 1882 expressly deals with an untrue statement of consideration, and provides that the consequence of this shall be that "such bill of sale shall be void in respect of the personal chattels comprised therein." If the bill of sale, as in this case, contains a covenant to pay in addition to an assignment of chattels, the covenant would not be avoided by this section. Sect. 9 avoids a bill of sale "given by way of security for money," if not made in accordance with the form in the schedule to the Act. That form, so far as it relates to the consideration, runs thus: "In consideration of the sum of £——, now paid to A. B. by C. D., the receipt of which the said A. B. hereby acknowledges;" and then follow in brackets these words, "[or whatever else the consideration may be]." Those last words in brackets, it is argued, shew that the consideration must be truly stated. But it must be remembered that s. 9 deals only with form (*Thomas* v. *Kelly* (1)), and the bracketed words may be satisfied by treating them as making the form flexible enough to allow the statement of some consideration other than a mere payment of money, as, for example, the delivery to the grantor

(1) 13 App. Cas. 506.

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of goods the price of which was to be secured by the bill of sale. Any larger meaning, such as that suggested by the argument, would make the provision in s. 8—that the consideration must be truly stated, or that the bill of sale should be void as to the personal chattels comprised in it—not only useless, but inconsistent. There would on that construction be two sections, 8 and 9, one immediately following the other, the former making the bill of sale partially void, and the latter making it wholly void for the same reason, that is, the untrue statement of the consideration.

It is suggested that s. 8 of the Act of 1882 applies to bills of sale of all kinds, whether given as security for money or not, and that s. 9 applies only to bills of sale given as security for money, and that the apparent inconsistency may thus be reconciled. But I think that a careful consideration of the two Acts of 1878 and 1882 shews that this is not the case. The former of these statutes only avoided bills of sale against execution creditors and trustees in bankruptcy of the grantors if not duly registered. But it included all bills of sale, whether for security of money or absolute transfers. The statute did not affect their validity as between grantor and grantee. The statute of 1882 avoided the bills of sale to which it refers even as between grantor and grantee. But it only refers to bills of sale given as security for money. Sect. 3 expressly provides that "this Act shall not apply" to other bills of sale. Consequently the repeal by s. 15 of ss. 8 and 20 of the previous Act, though in terms absolute, must be confined to a repeal of those sections only as to bills of sale given as a security for money. The repeal does not apply to other bills of sale. The result is that bills of sale not given as security for money are still governed by ss. 8 and 20 of the former Act. It follows that s. 8 of the Act of 1882 only applies to bills of sale given as security for money, and the supposed distinction in this respect between ss. 8 and 9 does not really exist. This was so held by Fry, L.J., in *Swift* v. *Pannell* (1), and I see no reason to doubt the correctness of that decision.

The other objection is, that there was a condition agreed on

(1) 24 Ch. D. 210.

which is not stated in the bill of sale; and this omission, it is argued, deviates from the direction in the form which requires the insertion of "terms . . . which the parties may agree to for the . . . defeazance of the security." The omitted term here was not, in my opinion, for defeazance. It was an agreement by the grantee to exhaust other securities given him for the same debt before resorting to this. It is argued that, if he did so, that would defeat this security to the extent of the payment so made. That is a complete misapplication of the word "defeazance." A debt is not defeated by being paid. A security is not defeated by payment of the debt. There is nothing in the alleged agreement which defeats any of the provisions of this deed. It is a mere condition by which the grantee, for the benefit of the grantor, arranges the order in which he will realize his securities.

Then it is argued that, even if it is not a defeazance, but only a condition, it is within the word "defeazance" so used in the form. But in s. 10, sub-s. 3, of the Act of 1878, which is to be read with the Act of 1882, "defeazance" is contradistinguished from "condition"; and it is provided that every defeazance, condition, or declaration of trust, subject to which the bill of sale is given, shall be written in it, or the registration shall be void. Therefore, whatever may be the consequence of omitting the condition, it does not seem to me to be a breach of s. 9 of the Act of 1882. If it is only a breach of s. 10 of the Act of 1878, the consequence would seem to be that the registration is void; that is, the bill of sale must be treated as an unregistered bill of sale, the effect of which, under s. 8 of that Act, would be that it would be void "so far as regards the property in, or right to the possession of, any chattels" comprised therein, and in the possession of the grantor at the time of execution as against execution creditors or trustees in bankruptcy of the grantor, but valid as to every one else. Apparently that section would not make void the covenant for payment of the debt. But, as s. 8 of the Act of 1878 is repealed as to bills of sale for securing money, such a bill of sale is now to be treated as though it were unregistered under s. 8 of the Act of 1882. The consequence is, that it is void against every one as to the chattels comprised in it, but not

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further, and the covenant for payment which it contains is unaffected by this section.

The difference between ss. 8 and 9 of the Act of 1882 is, that s. 8 avoids bills of sale which do not comply with its provisions only in respect of the personal chattels comprised therein. Sect. 9 altogether avoids bills of sale which are not made in accordance with the form in the schedule. This difference was recognised in *Davies* v. *Rees* (1), where it was held by the Court of Appeal that a covenant in a bill of sale for security of money which did not comply with s. 9 was avoided as well as the rest of the bill of sale.

In *Woodward* v. *Heseltine* (2), the Court of Appeal were of opinion that the description of the grantee on the face of the bill of sale was so ambiguous that it was uncertain whether the grantee was a corporation or an individual; and that this was not in accordance with the form, which certainly requires a clear and definite description of a grantee upon the face of the document. The House of Lords dissented from this, construing the bill of sale to mean that the grantee was an individual whose name and address were distinctly given: *Simmons* v. *Woodward*. (3) Some of the language of the learned Lords detached from the context has been used on both sides in this case to support the opposite arguments. I think that the point we have now to decide was not decided or intended to be decided by the House of Lords, and that their judgments do not assist either side in this controversy. The result is that the covenant in this deed is not invalidated by the Bills of Sale Acts.

But there is another consideration which makes the counterclaim in this action improper. The learned judge has found that the grantor executed this bill of sale "upon a complete understanding between the parties at the time that this document should not be made available against him or his goods until all the other documents, many of which were at that time handed over to the defendant, were realized or attempted to be realized, and realization should have failed;" and he finds that

(1) 17 Q. B. D. 408. (2) [1891] 1 Ch. 464.
(3) [1892] A. C. 100.

this was "a substantial part of the bargain between the parties at the time." The point is distinctly taken by the 5th paragraph of the defence to the counter-claim. The agreement so pleaded seems to me not inconsistent with the bill of sale. It is a strictly collateral agreement. There is no statute requiring it to be in writing, and, if there were, it would probably be considered fraudulent to insist upon it after the whole contract had been partly performed by executing the bill of sale upon the faith of this agreement by the grantee: *Morgan* v. *Griffith* (1); *Erskine* v. *Adeane*. (2)

The judgment must, therefore, be varied by declaring that the bill of sale is void in respect of the personal chattels comprised therein. This leaves the covenant unaffected; but, as it appears from the evidence that the other securities were not exhausted, the counter-claim is premature, and the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for plaintiff: *Leggatt, Rubinstein, & Co.*
Solicitor for defendant: *Harold S. Simmons.*

E. L.

[IN THE COURT OF APPEAL.]

GOOD & CO. *v.* ISAACS.

Ship—Demurrage—Charterparty—Termination of Voyage—Delivery at usual Fruit Berth—Obligation to Unload.

By a charterparty the vessel was to proceed to Hamburg with a cargo of oranges "to be discharged at usual fruit berth as fast as steamer can deliver, as customary, and where ordered by the charterers."

The ship was at Hamburg ready to deliver on March 6, 1889, but the usual fruit berths were then fully occupied, and the fruit warehouses were full, and owing to the action of the harbour authorities the ship could not commence discharging until March 11, when she was discharged as fast as she could deliver:—

Held, by the Court of Appeal (Lord Herschell, and Lindley, and Kay, L.JJ.), reversing the judgment of Charles, J.: first, that the obligation of the charterers to unload did not commence until the ship was berthed in a usua

(1) Law Rep. 6 Ex. 70. (2) Law Rep. 8 Ch. 756.

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fruit berth; secondly, that the ship could not be said to be so berthed until she occupied a berth with the assent of the harbour authorities; thirdly, that in the provision in the charterparty "as fast as steamer can deliver, as customary," the word "customary" must be taken to refer to the discharge and delivery by the ship, rather than to the taking delivery by the charterer or consignee, and to mean that the discharge and delivery must be as fast as the custom of the port would allow; and lastly, that there was no delay for which the charterers were responsible, and consequently that the shipowners were not entitled to any demurrage.

Appeal from Charles, J., without a jury.

This was an action for breach of a charterparty. The action was brought by the owners of a steamship, called the *Artemis*, to recover from the defendants, who were fruit merchants and the charterers of the vessel, certain sums of money claimed by them, (1.) in respect of an alleged failure to load a full and complete cargo, in accordance with the terms of the charterparty, and (2.) for demurrage.

The action was tried by Charles, J., without a jury, in November last, and the learned judge decided the first claim in favour of the defendants; but he held that the plaintiffs had made good their claim for demurrage, and he accordingly, upon that point, gave judgment for the plaintiffs.

From that judgment the defendants now appealed, and the facts material for the purposes of the appeal were as follows: The charterparty, which was entered into on February 2, 1889, provided that the *Artemis* should proceed to certain ports in the Mediterranean, and there load a full and complete cargo of oranges, and, being so loaded, should therewith proceed to certain named ports, one of which was Hamburg. The provision with regard to the discharging of the cargo, upon which the question turned, was in the following terms:—"To be discharged at usual fruit berth as fast as the steamer can deliver, as customary, and where ordered by the charterers." According to the particulars of demurrage given by the plaintiffs, the ship was moored at the quay at Hamburg, ready to deliver, at 5 p.m. on March 6, 1889; no work was done on the 7th, 8th, 9th, and 10th; at 6 a.m. on March 11, the discharge commenced, and it was finished at 12.30 on the 12th; and they claimed 80*l.* for four days' demurrage at 20*l.* per day. By their statement of defence the defendants

pleaded that "by reason of the usual fruit berth in Hamburg being fully occupied, and there being no other available space or accommodation for the ship" on the days in question, she "was not able to commence discharging her cargo until March 11, 1889, when she was discharged as fast as she could deliver her cargo."

It appeared from the evidence that the berths usually occupied by fruit ships at Hamburg are two berths opposite certain warehouses upon the quay, the practice being to discharge fruit by means of cranes into these warehouses. The warehouses on the quay, as well as the appliances for unloading there, are under the management of Government officials, who regulate the unloading of vessels, and without whose permission the cranes cannot be used; and it rests with the official having the management of the quay to determine where a vessel is to be moored. The *Artemis* arrived at Hamburg on the afternoon of March 6, and was moored near to, or in front of, the fruit warehouses at a place proper for unloading, but in the view which the Court took of the evidence this was done without the authority of the officials who had the management of the quay. Accordingly, at 6 A.M. on the next morning, the *Artemis* was ordered to remove from this place, and moved a short distance from it. She appeared to have been moved once or twice, but was moved to the place where she ultimately discharged on the morning of March 8.

According to the evidence, the reason why the discharge of the vessel did not commence earlier than the 11th was that the warehouses were full, or that part of them into which fruit was discharged was full, and there was not room for the fruit which formed the cargo of the *Artemis* till the 11th, the day when the discharge commenced. Although a part of the warehouses had been, by arrangement between the Government authorities and the fruit merchants, allotted to fruit, and assigned to the fruit merchants, the control of the warehouses and of the appliances for discharging into them was in the hands of Government officials, without whose sanction the cranes could not be used for the purpose of effecting the discharge of the cargo. When it appeared, on the arrival of the *Artemis*, that some delay would ensue before the cargo could be discharged into the warehouses,

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the consignee offered to take discharge into lighters, pointing out at the same time that such a mode of discharge from the vessel would occupy some days; but the master refused to discharge the cargo in that way.

Lawson Walton, Q.C., and *Rufus D. Isaacs*, for the appellants. The learned judge has held that the plaintiffs are entitled to four days' demurrage, upon the ground that the vessel had arrived at one of the usual fruit berths, and was ready to discharge at 5 P.M. on the evening of March 6. But the evidence shews that the control of the harbour, of the quays and means of unloading, and of the warehouses, is in the hands of the harbour authorities; and that the cranes for unloading were occupied, and the warehouses were full, on March 6. The vessel was not allowed to remain where she was at 5 P.M. on that day. She was moved the next morning, and she was moved again afterwards. By the terms of the charterparty, she was to be discharged "at usual fruit berth as fast as steamer can deliver, as customary." "As customary" refers to the manner, and not to the time, of unloading, and it means according to the custom of the port. The obligation of the charterers to unload cannot begin until the vessel is properly berthed by the direction, or with the assent of, the proper authorities, in a usual fruit berth: *Tharsis Sulphur and Copper Co., Limited* v. *Morel Brothers & Co.* (1); *Postlethwaite* v. *Freeland*. (2) The ship never was to discharge except in the customary manner. The consignees were most anxious to get the goods, and the charterers used all reasonable diligence, but, owing to the action of the port authorities, and the fact that the warehouses into which fruit was put were full, there was no room for the fruit which formed the cargo of the *Artemis* until the morning of the 11th. On that morning the discharge of the cargo commenced; it was carried on as fast as possible, and it was completed at 12.30 on the 12th. Under these circumstances the charterers are not liable for any demurrage: *Wyllie* v. *Harrison & Co.* (3); Carver on Carriage by Sea, 2nd ed. 634.

(1) [1891] 2 Q. B. 647. (2) 5 App. Cas. 599.
(3) 13 Court Sess. Cas. 4th Series, 92.

Barnes, Q.C., and *F. W. Hollams*, for the respondents. All that the shipowner has to do is to get to the proper place; and here the vessel was alongside one of the fruit berths, close to the crane, and ready to discharge at 5 P.M. on March 6. The duty of providing and making use of proper means for the discharge of the cargo lies upon the charterer, and his liability to unload commences when the ship is at the named place ready to discharge. The appellants did not use reasonable diligence; they did not fulfil their duty until March 11, and they are liable for the four days' demurrage. In the provision in the charterparty, "as fast as steamer can deliver, as customary," the speed is the ship's power to deliver. The customary mode of delivery is by cranes, which takes two days, and no longer time than that should be allowed for discharge: *Castlegate Steam Ship Co., Limited* v. *Dempsey* (1); *Postlethwaite* v. *Freeland* (2); *Ford* v. *Cotesworth* (3); *Tapscott* v. *Balfour* (4); *Hick* v. *Rodocanachi* (5); *Nelson* v. *Dahl.* (6)

Isaacs, in reply. The shipowner must be ready and willing to discharge as customary before the obligation on the charterer to take delivery can arise. "Ready and willing" involves being "able," and the shipowner in this case never was able to discharge as customary before March 11. Therefore, it was not until March 11 that the obligation of the charterers arose, and that obligation they duly fulfilled: *Dunlop* v. *Balfour.* (7)

Cur. adv. vult.

1892. April 2. LORD HERSCHELL (after stating the facts, continued). I take it to be clear that, under the terms of the charterparty, the obligation of the charterer to unload did not commence until the vessel was berthed in a usual fruit berth. If authority for this were needed, the judgment of this Court in the case of the *Tharsis Sulphur and Copper Co.* v. *Morel Brothers & Co.* (8), appears to me to supply it; and I do not think that a

(1) [1892] 1 Q. B. 54.
(2) 5 App. Cas. 599.
(3) Law Rep. 4 Q. B. 127.
(4) Law Rep. 8 C. P. 46.
(5) [1891] 2 Q. B. 626.
(6) 12 Ch. D. 568, 580, 583; on appeal 6 App. Cas. 38.
(7) [1892] 1 Q. B. 507.
(8) [1891] 2 Q. B. 647.

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vessel can be properly said to be so berthed unless she occupies the berth by the direction, or with the assent of, the harbour authorities. If, though she has arrived there, she is not permitted to remain for the purpose of unloading, but is directed by the port authorities immediately to remove to another place, I do not think she can be said to have arrived at her place of discharge, so as to impose upon the charterers the obligation forthwith to unload. I am, therefore, unable to agree with the learned judge who tried the action in thinking that this obligation arose on the evening of March 6. In my opinion it commenced, at the earliest, on the morning of the 8th. Inasmuch, however, as the discharge was not commenced until the 11th and terminated on the 12th, the question still remains whether the plaintiffs have not made good a part of their demurrage claim. [His Lordship then stated the evidence upon this part of the case, and continued:—] I do not think that it was possible for the vessel to be discharged by means of cranes opposite the warehouses without the sanction of the authorities, and I do not think that there is any evidence that such sanction could have been obtained earlier than it was. Nor am I able to find evidence proving that there was any other usual fruit berth where the ship would have been allowed by the port authorities to effect her discharge earlier than she did, except by putting the cargo into lighters.

Under these circumstances, are the defendants liable for demurrage? The plaintiffs assert that they are. The charterers, they say, were bound to take discharge of the cargo "as fast as the steamer could deliver, as customary." The customary mode of delivery was to discharge by means of cranes into the warehouses. This took but two days, which they assert is the measure of the time allowed for discharging the vessel, even if it be established that according to the custom of the port the use of these cranes could not be obtained earlier than it was. That, they allege, is wholly immaterial; the ship must take the risk of it.

Now, it is to be observed that the plaintiffs themselves rely on the fact that the vessel was to be discharged in the customary manner. They refused to permit the discharge into lighters,

and insisted that no longer time was to be allowed for the discharge than would have been occupied had the discharge been effected by means of the cranes upon the quay. Yet, whilst claiming the benefit of this speedier mode of discharge because it was the customary one, they maintain that they were entitled to disregard the restrictions which the custom of the port places upon the use of those appliances. I do not think that it is possible to sustain this contention. Supposing that, at a particular port, the customary mode of discharge was by certain appliances belonging to the harbour authorities, and that the use of these appliances was restricted to particular days or hours, could it possibly be argued that under a charterparty worded like the present one the time for delivery was to be measured by ascertaining in what time a vessel could be discharged if those appliances were used every day and at all hours without regard to the port restrictions? I can see no real distinction between that case and the present, where the cranes could only be used according to the custom and regulation of the port, provided there was room in the warehouses to receive the goods as they were discharged. Although it was suggested in the course of argument that the circumstance that the fruit department of the warehouses was full, was due to the act of the consignees of the cargo by the *Artemis*, I do not think that this was proved to be the case, even supposing that it would be material. There can be no doubt that, under a charterparty such as the present, the charterers or consignees would be bound to do all in their power to procure discharge of the cargo as quickly as possible. It appears that, by the regulations of the port, the director of the quay has power to require the removal of goods from the warehouses on giving twenty-four hours' notice, although they are often left for a longer period. I think, under such circumstances, it would be the duty of those who were to receive the cargo, to require such notice to be given, and the only doubt I have entertained is whether there may not have been default on their part in this respect. The director states that he thinks he gave such a notice about March 7. He does not seem quite certain about it, and one may suspect that if more active steps had been taken by the consignees of the cargo, the warehouses

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might have been earlier ready, and the quay authorities in a position to permit unloading. But I cannot say that any such case was proved; and if it was to be relied on, it was for the plaintiffs to meet by proof of this the evidence of the charterers that they took discharge as fast as possible in the customary manner. No authority was cited which, in my opinion, conflicts with the view I have indicated. On the contrary, it receives, I think, support from the reasoning of the Lords who took part in the judgment of *Postlethwaite* v. *Freeland* (1), and the very point appears to have been decided by the Court of Session in Scotland in the case of *Wyllie* v. *Harrison.* (2) The charterparty there provided that the cargo was to be discharged "as fast as the steamer can deliver after having been berthed, as customary." It was the custom at the port of discharge that on notification by the consignees or charterers of the arrival of a vessel to one of the two railway companies whose lines ran along the quay, the company should provide trucks into which the cargo was to be discharged by means of steam cranes provided by the harbour authorities. It was a rule of the port that pig iron should not be laid down on the quay. On the arrival of the vessel due notice was given to the railway company by whose line the cargo was to be forwarded, but delay was occasioned through the failure of the railway company to supply trucks. The Lord President and three other judges of the Court of Session, held that under the circumstances the consignees were not liable to demurrage.

For the reasons I have given, I think the judgment of the learned judge in the Court below, as regards the question of demurrage, cannot be supported.

Lindley, L.J. I have read the judgment which has just been delivered, and I have nothing to add.

Kay, L.J. This is not a case in which the charterparty stipulated that the ship should be discharged within a specified time. Neither does it leave the time for discharging entirely unprovided for. It is a case between those two. The charterparty contains this provision: "To be discharged at usual fruit berth

(1) 5 App. Cas. 599. (2) 13 Court Sess. Cas. 4th Series, 92.

as fast as the steamer can deliver, as customary, and where ordered by the charterers."

The circumstances which must be regarded in construing this charterparty are that the cargo was perishable, consisting of oranges. The port of discharge was Hamburg. The time of the year when the ship arrived was March. The extreme cold then prevailing practically prohibited any discharge except into certain warehouses belonging to the port. If discharged upon the quay, the cold would have spoiled the fruit. There were two usual fruit berths in front of these warehouses. I think, under the circumstances, one or the other of these berths must be taken to be the usual fruit berth within the meaning of this charterparty.

The steamer arrived and took up a position at one of those berths on March 6, 1889. She had not obtained leave to moor there, and she was ordered away. She moved away, and another ship, the *Barcelona*, discharged at the warehouse. The *Barcelona* completed her discharge on the 7th; this ship then moved to her berth on the 8th. The warehouse was full. The 9th was Saturday. She was ordered to discharge on Monday, the 11th, and did so without any delay after that time. The charterers have been charged demurrage four days—that is, from the 6th to the 11th. I do not think it can be maintained that she was at the usual fruit berth before the 8th.

It has been argued that the word "customary" in this charterparty does not excuse the charterers for a delay in receiving the cargo occasioned by the custom of the port. The charterers, it is said, directly the ship was at the proper berth, were bound to take delivery as fast as the ship could give it. One, or at most two days, were enough to unload her, and for four of the six during which she was there demurrage should, therefore, be paid. No doubt, in a case where the words were, "the cargo is to be discharged with all dispatch according to the custom of the port," the House of Lords, in *Postlethwaite* v. *Freeland* (1), held that the word "customary" applied to dispatch, and meant such dispatch as the custom of the port permitted. But here, it is said, "customary" refers only to the mode of taking delivery, with which the shipowner has no concern.

(1) 5 App. Cas. 599.

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I cannot concur in this argument. I think that "as customary" in this charterparty relates directly to the discharge and delivery by the ship rather than to the taking delivery by a consignee. "To be discharged as fast as steamer can deliver, as customary," means that the discharge and delivery is to be as fast as the custom of the port would allow, and that the shipowner took the risk of a delay in that discharge and delivery owing to the custom of the port. It was argued that those words refer only to the mode of delivery—the means and appliances for actually taking the cargo out of the ship—and not to the time within which it is to be done, which is fixed by the words "as fast as steamer can deliver." I will assume that, by using the cranes at the warehouses, the discharge would be facilitated and be more rapid, and would take a shorter time than by any other method. The shipowner would, by the terms of this charterparty, be bound to use the customary mode if it were more expeditious. Why not also if it involved some little delay?

Then it was said, with some force, that the real reason for the delay was that the warehouses were full, and the shipowner had nothing to do with that. The charterers or consignees should have arranged that room should be found in them, or that some other mode of taking delivery should be substituted. On March 6, Detmold, consignee of a large part of the fruit, wrote, in answer to a letter of the captain, that the warehouses were full, that there were no quays available, and he offered to take delivery in the harbour, which, he said, would take three or four days, if not more, whereas if the ship waited till the 11th she could discharge at the warehouse by that night. The captain states that discharging in the harbour meant into lighters, which would take more time. The warehouses were under the management of the harbour authorities, said to be the Government, and the consignees were not responsible for their being full at the time. By the usual rule goods were removed in twenty-four hours, and if Sunday was not a working day this was done on Saturday the 9th, so that on Monday the 11th the warehouses were ready to receive this cargo. The captain having the alternative of discharging in the harbour into lighters, which would possibly have taken longer, elected, very prudently I should

think in the interests of the shipowners, to proceed by the customary mode of discharge, and waited till Monday the 11th, thereby possibly saving time for the ship and precisely following the terms of the charterparty.

I think the true result of the evidence is that there was no delay except what was occasioned by the custom of the port, and for this the charterers are not responsible.

Appeal allowed.

Solicitors: *C. J. S. Smith & Gofton; Botterell & Roche.*

W. W. K.

[IN THE COURT OF APPEAL.]

HARRIS & SONS *v.* JUDGE.

Practice—County Court—Action commenced in High Court—Transfer before Trial to County Court—Jurisdiction after Transfer—Costs—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *Part III., s.* 65; *Part IV., s.* 116.

After an action commenced in the High Court of Justice has been transferred to the county court, under the County Courts Act, 1888, Part III., s. 65, it becomes a county court cause, and the High Court has no jurisdiction to certify for costs.

Per Bowen, L.J., and Kay, L.J.: The meaning of sub-s. 2 of s. 116, in Part IV. of the same Act, is, that a certificate or an order to the effect therein mentioned may be made by a judge of the High Court in cases where he already has jurisdiction; and the rules laid down in that section are only applicable to actions which have not been transferred.

APPEAL from the judgment of the Divisional Court (Day and Charles, JJ.), reversing an order in chambers for the taxation of the plaintiffs' costs.

The action, which was commenced in the Queen's Bench Division of the High Court, was for 34*l.* 5*s.* 4*d.*, for work, labour, and materials. By an order under s. 65 of the County Courts Act, 1888, the action was transferred before trial to the county court, and was there tried, with the result that the plaintiffs recovered less than 50*l.*, but more than 20*l.* After the trial in the county court, the plaintiffs obtained from Pollock, B., in chambers, an order giving them liberty to tax the costs of the action according to the High Court scale. This order was reversed

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by the Divisional Court, on the ground that the learned judge had no jurisdiction to make it. The plaintiffs appealed.

Sills, for the plaintiffs. Sects. 65 and 116 of the County Courts Act, 1888 (1), must be read together, and although, according to s. 65, after a transfer the action is to be tried and all proceedings therein are to be taken as if it had been commenced in the county court, s. 116 shews that, with regard to costs at all events, the jurisdiction of the High Court is carefully preserved. That section enacts, that "with respect to any action brought in the High Court which could have been commenced in a county court," if in any action founded on contract the plaintiff recovers 20*l.* or upwards, but less than 50*l.*, he is not to be entitled to more costs than if he had brought his action in the county court, unless a judge of the High Court makes a certain certificate, or "unless the High Court or a judge thereof at chambers shall by

(1) The County Courts Act, 1888, Part III., "Jurisdiction and Law," s. 65, after empowering any party to an action of contract brought in the High Court, the claim in which does not exceed or is reduced to 100*l.*, to apply to a judge of the High Court at chambers to order such action to be tried in any Court in which it might have been commenced, and after enacting that the judge shall, unless there is good cause to the contrary, order such action to be tried accordingly, further enacts that "the action, and all proceedings therein, shall be tried and taken in such Court as if the action had been originally commenced therein; and the costs of all parties in respect of proceedings subsequent to the order of the judge of the High Court shall be allowed" according to the county court scale, and the costs of the order and the proceedings previous thereto according to the Supreme Court scale.

Part IV., "Procedure and Trial," s. 116: "With respect to any action brought in the High Court which could have been commenced in a county court, the following provisions shall apply:—

"1. If in an action founded on contract the plaintiff shall recover a sum less than 20*l.*, he shall not be entitled to any costs of the action, and if he shall recover a sum of 20*l.* or upwards, but less than 50*l.*, he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in a county court; and

"2. If in an action founded on tort the plaintiff shall recover a sum less than 10*l.*, he shall not be entitled to any costs of the action; and if he shall recover a sum of 10*l.* or upwards, but less than 20*l.*, he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in a county court; unless in any such action, whether founded on contract or on tort, a judge of the High Court certifies that there was sufficient reason for bringing the action in that Court, or unless the High Court, or a judge thereof at chambers, shall by order allow costs."

order allow costs." This refers to any action brought in the High Court wherever it may be tried, for the words are not "brought and tried," but "brought" merely. The authorities are consistent with this contention: *Bazett* v. *Morgan* (1); *Wilson* v. *Statham*. (2) The order made by Pollock, B., was, moreover, in accordance with the practice which has hitherto prevailed in the chambers of the judges of the Queen's Bench Division.

Ernest Pollock, and *C. C. Scott*, for the defendant. Under s. 65, after an action commenced in the High Court has been transferred to the county court, the High Court has no longer jurisdiction to make any order therein; and the words "such action" in sub-s. 2 of s. 116 obviously apply only to actions commenced and continued in the High Court. Sect. 116 and both its subsections must in fact be confined to actions tried in the High Court. It was held in *Bowles* v. *Drake & Co.* (3), under the County Courts Act, 1867, that when a cause has been remitted to the county court for trial, it becomes a county court case, and the determination of a Divisional Court on appeal from the decision of the county court judge is final; and in *Moody* v. *Steward* (4), which also arose under the Act of 1867, it was held by Bramwell, B., that, after an action had been sent to be tried in a county court, the whole action had gone to the county court, and it was no longer within the jurisdiction of the Court in which the action was brought; and there is nothing in either of the two cases cited with reference to s. 116 of the Act of 1888 (*Bazett* v. *Morgan* (1), and *Wilson* v. *Statham* (2)) which is inconsistent with this.

1892. June 1. LINDLEY, L.J. (after stating the facts of the case, continued): The question which this Court has now to decide, is not whether the plaintiffs are entitled to their costs of the action, nor whether, if they are, those costs ought to be taxed on the county court scale or on the High Court scale. The question is whether a judge of the High Court has any jurisdiction to make any order in an action which was commenced in

(1) 24 Q. B. D. 48.
(2) [1891] 2 Q. B. 261.
(3) 8 Q. B. D. 325.
(4) Law Rep. 6 Ex. 35.

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the High Court, but which was transferred to the county court before it came before him. This question depends entirely on the County Courts Act, 1888 (51 & 52 Vict. c. 43). That Act is divided into parts, and Part III. relates to "Jurisdiction and Law." Amongst the sections grouped under this head are some relating to actions commenced in the High Court, but remitted by a judge of that Court to the county court. These sections are 65, 66, 69. Sect. 65 is the section applicable to this case. [The Lord Justice read that section, and continued :—]

This section expressly says that after the action has been transferred to the county court "the action and all proceedings therein shall be tried and taken in such Court as if the action had been originally commenced therein." I cannot myself read these words in any sense which leaves any jurisdiction in the High Court. Every application which can properly be regarded as a proceeding in the action must be taken in the county court as if the action had been originally commenced therein. An application for the costs of the action or for an order to tax them is in my opinion a proceeding in the action, and must, therefore, be made to the county court, and not to the High Court. This was the view taken by the Divisional Court, and this, in my opinion, is the correct view. This was the course of procedure before 1888, and I see no indication of any intention on the part of the legislature to alter the practice: *Moody* v. *Steward* (1); *Bowles* v. *Drake & Co.* (2)

But then it is contended that this view, though warranted by s. 55, is not in conformity with s. 116. This section is in Part IV., which is headed "Procedure and Trial," and runs as follows :— [The Lord Justice read s. 116.]

This section is addressed to costs, and to costs only, and does not relate to jurisdiction, which has been dealt with in Part III. of the Act. Nor can I find in s. 116 any language which qualifies that part of s. 65 to which I have already alluded as deciding the question of jurisdiction after a transfer. I cannot read the words "unless in any such action," &c., in s. 116, as applicable to an action tried in the county court, and the merits of which a judge of the High Court must master

(1) Law Rep. 6 Ex. 35. (2) 8 Q. B. D. 325.

before he can properly make any certificate or order respecting the costs of it. In a transferred action the rules contained in s. 116 must, in my opinion, be applied by the judge of the county court to which the action has been transferred, and not by the judge of the High Court out of which the action has been removed. In an action not transferred, the rules laid down in s. 116 will, of course, have to be applied by the High Court. This construction appears to me to give full effect to both sections, and to be in conformity with the general scheme of the Act.

Upon the question of costs, the two sections certainly create a difficulty. Sect. 65 says, that the plaintiff's costs of a transferred action, down to the order of transfer, are to be on the High Court scale. Sect. 116 does not, in terms, refer to transferred actions, but is so worded as possibly to include them; and the section makes the plaintiff's costs depend on the amount he recovers. It is not necessary on the present occasion to decide the joint effect of these two sections, and I say no more about them.

My decision is based solely on the point of jurisdiction. Upon this point the Divisional Court was, in my opinion, right; and the appeal ought, therefore, to be dismissed with costs.

BOWEN, L.J. I have come to the same conclusion, after much reflection. The first view that I took during the argument was in favour of the opposite contention; and, if I give a judgment of my own, it is only to point out where I think the opposite view fails, and why I come to the same conclusion as my brothers. This action was brought in the High Court, and was transferred to a county court. Sect. 65 is the section which deals with the question of jurisdiction. It provides that, where an action has been transferred to a county court, the action and all proceedings therein shall be tried and taken in such court as if the action had been originally commenced therein. All proceedings in the High Court are to cease after the transfer, and the action must be taken to be a county court action. As to the costs down to the time of the transfer, the section is imperative. They are to be allowed according to the scale of costs for the time being in use in the Supreme Court. After the transfer they are to be allowed according to the scale of costs in the county court. That is not

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quite clear; it leaves open the question what jurisdiction the county court judge has. It may be that the construction must be put on it that it gives the county court judge jurisdiction as to the granting of costs, though the costs, if allowed, are to be according to a scale. I do not, however, give any decision upon that point as it was not gone into in argument and is not necessary for the determination of the case.

The plaintiffs have come to the High Court for a certificate under s. 116, sub-s. 2. Has the judge jurisdiction to give it? Sect. 116 applies to all actions brought in the High Court, including those transferred to a county court, and in the case of certain actions commenced in the High Court it deprives the parties of their costs in certain events. Then can the plaintiffs come to a judge of the High Court for a certificate under sub-s. 2? If such a judge has any jurisdiction under the sub-section at all, it must be under the words introducing the exception, "unless in any such action . . . . a judge of the High Court certifies that there was sufficient reason for bringing the action in that Court, or unless the High Court, or a judge thereof at chambers, shall by order allow costs." It seems to me that those words do not bring causes within the jurisdiction of the High Court where it has not already got jurisdiction. In certain cases the plaintiff is not to have any costs at all, and in certain others he is only to have them on the county court scale, unless the judge otherwise orders. That is, when the case is one within the jurisdiction of the High Court; when it is not, the words do not apply. The words of the exception do not confer any jurisdiction, but simply provide for the making of an order by a judge of the High Court in a case over which he naturally had the jurisdiction, which he would have over an action which remained in the High Court.

I may add that it is a misfortune that any Act of Parliament should be printed in the way this Act is. The words of the exception to which I have referred must obviously apply, and were intended to apply, to sub-s. 1 of s. 116, as well as to sub-s. 2; and yet they are printed as part of sub-s. 2. As the section is printed it is misleading, and it is only by reason of the necessary form of the words that it turns out they must be con-

strued as applying to both sub-sections. It might be worth while to refer to the Parliament Roll to see whether, as originally passed, there was a break to separate this clause from the 2nd sub-section.

I think the judgment appealed against is right. The judge in chambers had no jurisdiction, and the appeal must be dismissed. Our judgment does, I am aware, interfere with the practice hitherto accepted at chambers. I have made inquiries as to that, and have ascertained that Pollock, B., in making his order only followed the usual course. It is, however, satisfactory to find that the Court does not upon its own unassisted view alter the practice, but is affirming the judgment of a Divisional Court, consisting of two experienced judges.

KAY, L.J. The plaintiff in this case brought his action in the High Court on December 16, 1891. The action was founded on contract.

By an order dated January 16, 1892, at his own instance, it was transferred to the county court. The amount recovered in it was more than 20*l.*, but less than 50*l.* Pollock, B., by an order in chambers dated April 1, 1892, directed that the costs of the action should be taxed on the High Court scale, including the costs of that application. On April 30, 1892, the Divisional Court set aside that order, and directed the plaintiff to pay the costs before them and in chambers. The present appeal is from this order of the Divisional Court.

By s. 116 of the County Courts Act, 1888, if a plaintiff in an action founded on contract, brought in the High Court, which could have been commenced in the county court, recovers less than 20*l.*, he shall not be entitled "to any costs, and if 20*l.* or upwards, but less than 50*l.*," he shall not be entitled "to any more costs than he would have been entitled to if the action had been brought in a county court." I particularly observe that this section only applies to actions which could have been commenced in a county court. The provision is absolute so far, and applies whether the action has been transferred to the county court or not; but it continues, "unless . . . . a judge of the High Court certifies that there was sufficient reason for

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bringing the action in that Court, or unless the High Court or a judge thereof at chambers shall by order allow costs." That clearly applies to the case where the action remains in the High Court and is tried there. The certificate would be given at or after the trial, and so I presume would the order for costs which that section contemplates. Then comes a proviso that, if the plaintiff obtained judgment under Order XIV. for 20*l.* or upwards, he is to have costs on the High Court scale. That is because in the county court there is no power of making a summary order for judgment such as may be made in the High Court under Order XIV.

Does this section empower a judge of the High Court to give such a certificate or make such an order for costs after the whole action has been transferred to a county court? In my opinion, it does not. I think that after the transfer the High Court can make no order in the action except in case of an appeal under Part V. of the Act, and that the words are completely satisfied by reading them as applicable only when the action is tried out in the High Court, not after it has been transferred.

Sect. 65 empowers a judge at chambers to transfer any actions in which not more than 100*l.* is claimed to a county court, and provides that when the order is made "the action and all proceedings therein shall be tried and taken in such court as if the action had been originally commenced therein." The costs subsequent to the transfer are to be on the county court scale, "and the costs of the order and all proceedings previously thereto shall be allowed" on the High Court scale.

After such transfer therefrom the judge of the High Court has no further jurisdiction in the action.

And as to costs, if less than 50*l.* is recovered, in my opinion, s. 116 applies, and not s. 65, and only county court costs can be given as to any part of the action.

I, for these reasons, think, with deference, that the order of Pollock, B., was made without jurisdiction, and that the Divisional Court were right in setting it aside.

Appeal dismissed.

Solicitors: *Dod, Longstaffe, Son, & Fenwick; Griffinhoofe & Brewster.*

W. W. K.

[IN THE COURT OF APPEAL.]

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Company—Winding-up—Set-off—Mutual Credits or Dealings—Life Insurance Company—Action by Company for Money Lent—Policy not matured at Commencement of Winding-up, but matured at Date of Action—Release—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 38—*Joint Stock Companies Arrangement Act*, 1870 (33 & 34 *Vict. c.* 104), *s.* 2.

The defendant in 1879 effected with the plaintiffs two policies of life insurance for 1000*l.*, each upon his own life, from the date thereof to May 7, 1888, by which policies the plaintiffs contracted that in the event of the defendant being alive on that day they would then pay the moneys assured to the defendant. In April and June, 1887, the defendant obtained two loans of 570*l.* and 600*l.* respectively from the plaintiffs upon mortgage of the policies. In August, 1887, a petition was presented for the winding-up of the plaintiff company, and a provisional liquidator was appointed. The defendant continued to pay to the plaintiffs the premiums upon the policies down to May 7, 1888; but the moneys assured by the policies were never paid to him. In July, 1889, a winding-up order was made. In April, 1890, an arrangement under the Joint Stock Companies Act, 1870, was entered into between the plaintiff company and the Sun Life Assurance Company, whereby it was provided that the policies of the plaintiff company should be transferred to the Sun Company, and that the holders of policies in the plaintiff company should, in full satisfaction of all claims upon the plaintiffs, accept certain reduced payments from the Sun Company. A meeting of policy-holders was summoned under s. 2 of the Act, at which a statutory majority agreed to the arrangement, but the defendant did not himself assent to it; it was in June, 1890, duly sanctioned by the Court. In December, 1890, the plaintiffs brought an action against the defendant to recover the amount of the loans, and the defendant sought to set off against the plaintiffs' claim the sums which, but for the winding-up, would have been payable to him upon the policies:—

Held, that the defendant was entitled to the set-off.

By s. 2 of the Joint Stock Companies Arrangement Act, 1870, where an arrangement is proposed between a company in the course of being wound up and "the creditors of such company, or any class of such creditors," the Court may order that a meeting of "such creditors or class of creditors" shall be summoned, and if a majority in number, representing three-fourths in value of "such creditors or class of creditors," agree to the arrangement, it shall, if sanctioned by an order of the Court, be binding on "all such creditors or class of creditors, as the case may be," and also on the liquidator and contributories of the company.

The persons summoned to the meeting under the above section were the policy-holders of the company, and no separate meeting was summoned of those whose policies had, as distinct from those whose policies had not, matured:—

Held, that the insured persons whose policies had matured formed a distinct

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class of creditors from those whose policies had not matured; that a separate meeting of such class ought to have been held under the Act in order to make the arrangement binding upon the members of that class; and that the arrangement did not, therefore, operate as a release by the defendant of his claim against the plaintiffs.

APPEAL from a judgment of Charles, J. (1)

The action was brought to recover the amount of two loans of 570*l.* and 600*l.*, with interest. The facts, which were not in dispute, were as follows:—

On February 5, 1879, the defendant effected with the plaintiffs two policies of 1000*l.*, each upon his own life, from the date thereof to May 7, 1888, whereby the amount assured was to be payable to him if he was living on May 7, 1888, or to his executors if he died within the term of the insurance. On September 10, 1880, he obtained from the plaintiffs a loan of 320*l.*, and in April, 1887, an additional sum of 250*l.* was advanced to him by the plaintiffs, making altogether 570*l.*, which sum was secured by a mortgage to the secretary of the plaintiff company of the first of the two policies above mentioned. In June, 1887, 600*l.* was advanced by the company on a similar mortgage of the second policy.

On August 5, 1887, a petition to wind up the plaintiff company was presented; and on September 2, 1887, a provisional liquidator was appointed. On September 5, the secretary forwarded receipts to the defendant for his premiums. "The petition," he wrote, "is to be heard on Wednesday next; the object, I am informed, being to obtain a scheme for reduction of contracts." No arrangement, however, was made at that time for any scheme, and after the lapse of nearly two years, namely, on July 30, 1889, a winding-up order was made, and on September 17, 1889, a liquidator was appointed. Meanwhile, on May 7, 1888, the money insured by the defendant's policies became due to him. He had regularly paid all the premiums, which were payable quarterly, both before and after the date of the petition to wind-up.

On April 11, 1890, a deed of arrangement was entered into between the plaintiff company and the Sun Life Assurance Com-

(1) [1892] 1 Q. B. 405.

pany under the Joint Stock Companies Arrangement Act, 1870 (33 & 34 Vict. c. 104), which was sanctioned by the Court on June 14, 1890. A meeting of policy-holders was summoned, under s. 2 of the Act, to agree to the arrangement; but no separate meeting was summoned of those whose policies had, as distinct from those whose policies had not, matured. (1) The defendant did not assent to the arrangement; but at the meeting a majority, representing three-fourths in value, did assent. The deed recited, among other things, that it would be advantageous, in the opinion of the liquidator, to the persons claiming in the liquidation, to effect an arrangement under which the policies held by them on August 4, 1887, should be transferred on agreed terms to some other office, and that the liquidator considered that the terms of the agreement thereinafter expressed would, if sanctioned by the Court, be for the benefit of the persons interested; and then provided, in clause 1, for the issue of new policies by the Sun Life Assurance Company to policy-holders whose policies, if subsisting, would not have matured by August 4, 1890, guaranteeing, first, "the payment on death, or other time specified in the said policy, of the reduced sum set against the policy-holder's name in the thirteenth column of the second schedule thereto;" and, secondly, the payment at such times as aforesaid of a certain dividend, payable out of the assets of the Sovereign Life Assurance Company.

By clause 2 it was provided that, "As to policies of the Sovereign Company, which, but for the said winding-up order,

(1) By s. 2 of the Joint Stock Companies Arrangement Act, 1870 (33 & 34 Vict. c. 104): "Where any compromise or arrangement shall be proposed between a company which is .... in the course of being wound up .... and the creditors of such company, or any class of such creditors, it shall be lawful for the Court, in addition to any other of its powers, on the application in a summary way of any creditor or the liquidator, to order that a meeting of such creditors or class of creditors shall be summoned in such manner as the Court shall direct; and if a majority in number representing three-fourths in value of such creditors or class of creditors present either in person or by proxy at such meeting shall agree to any arrangement or compromise, such arrangement or compromise shall, if sanctioned by an order of the Court, be binding on all such creditors or class of creditors, as the case may be, and also on the liquidator and contributories of the said company."

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would have matured between August 4, 1887, and August 4, 1890 . . . . the Sun Company will, within one month after proof of death and title, make the same reduced payments to the representatives of such policy-holders or their assigns, and on the same terms and conditions, as if such policy had been a subsisting policy, and had matured after August 4, 1890."

By clause 7 it was provided that, as the consideration for the obligations imposed on the Sun Company, the liquidator would from time to time pay over or transfer to the Sun Company all such parts of the assets of the Sovereign Company as would be properly applicable to meet the claims of the policy-holders of the Sovereign Company who were such on August 4, 1887.

Clause 11 provided as follows: "If this agreement is sanctioned by the Court, all policy-holders of the Sovereign Company who were such on August 4, 1887, shall accept the provisions hereof in full satisfaction of all claims on the Sovereign Company and the assets thereof." The deed further provided that the winding-up should be continued so far as might be necessary to settle the rights of all parties.

The reduced sums which, under clause 2 of the deed of arrangement, were set against the defendant's name in the thirteenth column of the second schedule thereto, were 26*l.* in respect of each of his two policies; and the estimated dividends, payment of which was guaranteed to him out of the assets of the plaintiffs by the Sun Company, amounted to 241*l.* on each policy.

In December, 1890, the plaintiffs by their liquidator brought this action against the defendant to recover the sum of 1345*l.* 19*s.* 5*d.*, being the amount of the above-mentioned two loans and interest thereon. The defendant pleaded a set-off of the 2000*l.* which was payable to him by the plaintiffs in respect of his two policies on May 7, 1888. He also counter-claimed for the difference between the money so due on the policies and the amount of the loans; but the counter-claim was not insisted upon at the trial.

The learned judge held that the defendant was entitled to the set-off (1), and the plaintiffs appealed.

(1) [1892] 1 Q. B. 405.

Buckley, Q.C., and *Hull*, (*H. Tindal Atkinson*, with them), for the plaintiffs, argued as in the Court below, and contended, in addition, that it was unnecessary under the Act of 1870 to call a separate meeting of the class of policy-holders whose policies had matured, as the whole body of policy-holders formed only one class of creditors, whether their policies had matured or not.

Crump, Q.C., and *Morton Smith*, for the defendant, were not called upon.

LORD ESHER, M.R. I am of opinion that this appeal must be dismissed. The plaintiff company, which is in liquidation, has brought an action by its liquidator to recover money lent by the company to the defendant before the liquidation, and the defendant sets up as a defence a right of set-off against the company or the liquidator, or both of them. In that state of facts it is argued, first, that the defendant has no right of set-off at all; and, secondly, that the claim upon which he relies has been released.

The first point which we have to consider is, what will destroy the right of set-off; when an action of debt is brought, will the fact of the plaintiff being in liquidation or bankrupt (the action being brought by the liquidator or trustee) of itself destroy the right, and drive the defendant into bankruptcy to prove his claim? Let us try what the rights of the parties would have been under the old law in such a case. A trustee brings an action to recover a debt due; a set-off is pleaded, and it is suggested that it would have been a good replication that the bankrupt could only pay 1*s.* in the pound, thus wiping out the set-off or reducing it to 1*s.* in the pound. It is enough to say that such a thing was never heard of. A set-off can only be set up where an action is brought; what is the right of the defendant after an action is commenced against him? Clearly it is to set off a debt due to him from the plaintiff; if the debt due to him is of the same kind as that in respect of which he is being sued, he can set it off. The right of set-off depends on the existence of a debt due to the defendant, and the fact of his debtor being a bankrupt does not prevent the set-off arising, though it prevents his obtaining in the bankruptcy more than his share of the assets;

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the whole debt is still in existence. Therefore, where an action is brought by a trustee in bankruptcy, he is in within the terms of the statute of set-off, and the defendant can set off a debt due to him from the bankrupt. What is the result of a plea of set-off? It is not a counter-claim or a cross-action, but a plea in bar; and therefore, in cases where the plea is made out, although it may be true that when the action was brought the defendant was a debtor of the plaintiff, yet, the plaintiff being the defendant's debtor to the same amount, the plaintiff's claim is barred. Bankruptcy, therefore, makes no difference to the right of set-off.

Now, the cases in which a debt could be set off in bankruptcy were limited, and many difficulties arose; but the subject was dealt with by s. 39 of the Bankruptcy Act, 1869, and s. 38 of the Bankruptcy Act, 1883, which enlarged the subject-matter of the plea of set-off; they made, however, no alteration in the result of a set-off, and a debt can, therefore, now be treated as a set-off which could not have been so treated under the old law, and when pleaded and proved it is still a bar to the action. We have, therefore, to see whether, when this action was brought, the defendant had a right to set off this debt. Now, when an action is brought by a company, through its liquidator, to recover a sum of money lent, the defendant may answer that the claim is true, but that the company is indebted to him in an equal or larger sum, which he has a right to set off against the claim. Was the company so indebted to the defendant in the present case? At the time when the action was brought the date for payment of the policies had arrived; the company was, therefore, then indebted to the defendant, who had a claim against them for a liquidated and ascertained amount, the sums insured by the policies. The company was indebted to him, and he to the company; but the winding-up prevented him from getting payment of the 2000*l.*, though he could prove in the winding-up in respect of it. The winding-up had no effect upon his right to plead a set-off; he had, therefore, a right to plead that the plaintiffs were indebted to him in a sum of 2000*l.*, and claim to set that sum off against the plaintiffs' claim, though he could not, of course, actually recover the 2000*l.* from the plaintiffs.

It seems to me clear that in this case the defendant had a right to plead a set-off, which, if proved, was a bar to the action; and it is immaterial whether it would have been a set-off before the statute (though I incline to think that it was), for I have no doubt that it comes within the terms of the section.

It is said that the decision in *Ex parte Price, In re Lankester* (1), is to a contrary effect; but the distinguishing feature of that case is, as was pointed out in *In re Asphaltic Wood Pavement Co., Lee and Chapman's Case* (2), that there was no action at all, and that the Court was only considering the rights of proof in bankruptcy. Had there been no action in the present case, and had the proceedings been in bankruptcy, it is unnecessary to consider what would then have been the rights of the defendant; we have to consider his rights in the action only, and in that point of view his set-off is so great as to bar the plaintiffs' claim. That is in accordance with the judgment in the *Asphaltic Wood Pavement Company's Case* (2); and it is not in conflict with the decision in *Ex parte Price, In re Lankester.* (1) The defendant, therefore, is entitled to the benefit of his set-off, unless the plaintiffs can say that the debt had been released as against them, and that the defendant had assented to take, and had taken, somebody else as his debtor. This question depends on what was done at the meeting of creditors, and whether what was there done bound the defendant, and bound him to the extent of releasing the plaintiffs from their liability; the time at which the action was brought is the date to which we must look for the purpose of determining this question.

Now, as to the meeting, we have to consider the persons who must be summoned to it, and who are to be dealt with as different classes; that is, we must consider the state of affairs at the date of the meeting, for the persons to attend it are those who have a right to attend it at that time, and it is that state of affairs, and not the position of things at the date of the original contract, that we must look at. The Act says that the persons to be summoned to the meeting (all of whom, be it said in passing, are creditors) are persons who can be divided into different classes—classes which the Act of Parliament recognises, though

(1) Law Rep. 10 Ch. 648. (2) 30 Ch. D. 216.

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it does not define them. This, therefore, must be done: they must be divided into different classes. What is the reason for such a course? It is because the creditors composing the different classes have different interests; and, therefore, if we find a different state of facts existing among different creditors which may differently affect their minds and their judgment, they must be divided into different classes.

In the present case, the persons who had notice of the meeting were policy-holders—that is to say, policy-holders whose policies had to be dealt with. But the defendant was not a policy-holder at all; his policies had been fulfilled, and he was a creditor for the amount of the policies, and could have sued the company for money due; he had a vested cause of action, the policy-holders had none; and it is obvious that he could not consider the matter with the same mind and from the same point of view as the policy-holders who were summoned to the meeting. I do not say that, when there is nothing left to be done but the payment of the money, a person in the defendant's position may not be said properly to be in the same class as others who are creditors of the society; but, at any rate, he cannot fall within the same class as those whose policies have not matured. The defendant, therefore, belongs to a different class from those persons who were summoned as policy-holders, for his policies had not to be dealt with in any way; they had already matured; he has, therefore, not been summoned to the meeting, and what was done there does not bind him. The judgment of the learned judge in the Court below must be affirmed; he was right in holding that the section applied so as to enlarge the subject-matter of a plea of set-off. As I have already intimated, I think that apart from the statute there would have been a set-off; but, if the right depends upon the statute, I entirely agree with the judgment of Charles, J., that the defence is available to the defendant, and is a bar to the action.

BOWEN, L.J. I am of the same opinion. The action is for money lent, and the defendant seeks to rely upon the defence that he is entitled as against the company to treat as a set-off money due on policies granted by the company to him, which

policies accrued due on May 7, 1888. At that date a petition to wind up the company had already been presented; the defendant had paid all the premiums on the policies both before and after the date of the presentation of the winding-up petition, and on the day when the policies matured there was a large sum of money owing to him by the company. What was the defendant's position on that day? The company was being wound up, for the winding-up order, though not then made, dated back when made to the presentation of the petition, and the defendant was in the position of a person who had effected a policy and assigned it to the company as security for a loan, and also of a person who was entitled to say that 2000*l.* was owed to him by the company. It is true that he could not successfully prosecute an action for the 2000*l.* against the company because of the winding-up; but he was entitled to prove against the company for the value of his claim. His case is, therefore, distinguished from that of other policy-holders whose policies had not matured; he had gone on paying his premiums after the winding-up until the date when his policies became due, and his claim on his policies had therefore a fixed and ascertained value; this operated to his benefit, and the case has considerable resemblance to *Macfarlane's Claim, In re Northern Counties of England Fire Insurance Co.* (1), and *In re Bridges, Hill* v. *Bridges.* (2) Further, the defendant had the company's money in his pocket, and was entitled to make use of a counter-claim, or, more correctly, a set-off, against any action which the company might bring against him to recover the money; he could not sue the company or counter-claim against them in the strictest sense of the term because of the liquidation; but he could say that the transactions had resulted in mutual debts, and that he had a right to set off the debt of the company to him against his own debt to the company. That was his position when his policies matured, and he could be in no worse position when the company brought their action; he was entitled to set up his defence of set-off, which is so large in amount as to be a bar to the company's claim. That being so, I agree with the Master of the Rolls that it is unnecessary to consider what would have been the position

(1) 17 Ch. D. 337. (2) 17 Ch. D. 342.

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of the parties had there been only bankruptcy proceedings and no action had been brought. What is there to prevent the defendant's right of set-off in this action? Certainly not the winding-up, which has not altered the position and rights of the parties in this respect. As far as I can see, this is a good set-off at law; but if it were not a good legal set-off by reason of the existence of an assignment of the policies to the secretary of the company, it would, at all events, be a good set-off in equity.

The operation of s. 39 of the Act of 1869 and s. 38 of the Act of 1883 has been to enlarge, not the effect of a set-off, but the meaning of the term. This is clear from the decision in *In re Asphaltic Wood Pavement Co.* (1), and is especially clear in the judgment of Cotton, L.J., which is cited at some length by Charles, J., in his judgment now appealed against. It is said, however, that the decision in *Ex parte Price, In re Lankester* (2), is inconsistent with that case, and covers the present one; but I am unable to agree with that contention. The case of *Ex parte Price, In re Lankester* (2), dealt only with the doctrine of mutual rights in relation to the proof of a set-off in a winding-up, not in a case where an action had been brought; and the Court was dealing with the valuation of current policies subsisting at the time of the accrual of the right of set-off which was under consideration. In the present case, however, the policy had ceased or matured, and we are dealing with the rights of a person who is entitled to the full value of the policy. There is, therefore, in the present case, either a mutual debt or a mutual dealing; and unless there has been a release of the defendant's claim against the plaintiffs, the latter are out of court.

This question of a release depends, first, upon the construction of the document; secondly, upon the effect of the statute on that document. I feel grave doubt whether the term "policy-holder" includes those persons who have been policy-holders, but whose policies have matured not by death but by the happening of the stipulated event; but it is unnecessary to decide that question if we think that under the Act of 1870 the deed of arrangement did not bind dissentient creditors. What is the proper construction of that statute? It makes the majority of the creditors

(1) 30 Ch. D. 216. (2) Law Rep. 10 Ch. 648.

or of a class of creditors bind the minority; it exercises a most formidable compulsion upon dissentient, or would-be dissentient, creditors; and it therefore requires to be construed with care, so as not to place in the hands of some of the creditors the means and opportunity of forcing dissentients to do that which it is unreasonable to require them to do, or of making a mere jest of the interests of the minority. If we are to construe the section as it is suggested on behalf of the plaintiffs it ought to be construed, we should be holding that a class of policy-holders whose interests are uncertain may by a mere majority in value override the interests of those who have nothing to do with futurity, and whose rights have been already ascertained. It is obvious that these two sets of interests are inconsistent, and that those whose policies are still current are deeply interested in sacrificing the interests of those whose policies have matured. They are bound by no community of interest, and their claims are not capable of being ascertained by any common system of valuation. Are we, then, justified in so construing the Act of Parliament as to include these persons in one class? The word "class" is vague, and to find out what is meant by it we must look at the scope of the section, which is a section enabling the Court to order a meeting of a class of creditors to be called. It seems plain that we must give such a meaning to the term "class" as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest. If that be so, in considering the deed of arrangement made with the company which took over the business of the Sovereign, we must so construe it as not to include in one class those whose policies had already ripened into debts, and those whose policies might not ripen into debts for years to come; for the position of a person like the defendant, who had an ascertained sum of 2000*l.* due to him from the company, was entirely different from that of those policy-holders whose future was entirely uncertain. It was, therefore, not right to summon as members of one and the same class those who had an absolute bar against any claim of the company and those who had not. I think, therefore, that

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there was no release of the defendant's claim against the plaintiffs, and that the appeal must be dismissed. I am not sorry to have had the opportunity of calling attention to s. 2 of the Act of 1870, which is constantly utilized, and often, I think, very carelessly and unjustly.

KAY, L.J. I am of the same opinion. My judgment depends upon the facts of the case, which are very peculiar and may possibly never recur. The defendant took out two policies on the same day in a form which gave his representatives a right to recover the amount if he died before May 7, 1888, and made it payable on that day to him if he were then alive. There were two events in which he or his representatives became entitled to the money, subject to the premiums being kept up. The defendant afterwards mortgaged the policies to the company to secure moneys lent to him, and the company have brought this action to recover the moneys so lent. The form of the policy shews that the capital funds of the company alone were liable for the amount insured, and the effect of this, as appears from *In re State Fire Insurance Co.* (1), is not to create a charge on the funds; it amounts to a condition that the company will only be liable in case they have sufficient funds to pay the amount of the policy. Then on August 5, 1887, there was a winding-up petition; and on September 2 a provisional liquidator was appointed. The time for the maturing of the defendant's policies was drawing near, and the premiums were paid by him to the provisional liquidator. On May 7, 1888, the policies matured. No winding-up order had then been made, and the defendant was entitled to the debt of 2000*l.* owing by the company to him. It is said that the debt was not owing to the defendant because he had executed an assignment of his policies to a trustee for the company, and so mortgaged them to secure advances from the company, and therefore there was no liability on the part of the latter to the defendant, who was not entitled to a re-assignment of the policies until he had paid off the amount of the advances. On July 30, 1889, the winding-up order was made, and this related back to August 5, 1887, the date of the winding-up petition. Then a

(1) 1 D. J. & S. 634.

long time elapsed; and on April 11, 1890, a deed of arrangement was entered into, which is relied upon as a release. The company has now brought this action to recover the moneys lent, and the defendant claims to be entitled to a set-off for the moneys due on the policies, basing his claim chiefly upon the fact of the transaction amounting to a mutual credit or dealing within s. 38 of the Bankruptcy Act, 1883. It is not denied that when the policies matured the company had sufficient funds to pay them. They were, therefore, then indebted to the defendant in the full amount of these policies.

The case of *Ex parte Price, In re Lankester* (1), is the only decision which has been cited to us as throwing any difficulty in the way of the defendant's set-off; but there is a very broad distinction between the two cases; in that case a proof was tendered by the company in the bankruptcy of the assured, and an attempt was made on behalf of the trustee in bankruptcy to avail himself of the mutual credit clause, because at the date of the bankruptcy the bankrupt was entitled to a current policy which had not matured; in other words, the bankrupt was indebted to the company, and tried to set off what was not due, but the value of what might become due upon the policy. In the present case, however, the claim which the defendant seeks to set off had already accrued due; it was a sum ascertained and liquidated; this makes all the difference. I do not in any way desire to dissent from the decision in *Ex parte Price, In re Lankester* (1), but it is distinguishable on the ground I have indicated from the present case, which more nearly approaches the case of *In re Asphaltic Wood Pavement Co.* (2) There was a clear debt due upon these policies when the present action was brought; and I think we may discard the argument founded upon the fact that there had been an assignment of the policies to the company, for there will be a set-off in equity in cases where, but for some such circumstance as this assignment, there would have been a legal set-off. The company were liable to the defendant for the amount of the policies, subject of course to their charge upon the policies for the advances, and I think that in this action the defendant probably had a set-off against

(1) Law Rep. 10 Ch. 648. (2) 30 Ch. D. 216.

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the company wholly independent of the section. If, however, he had not, there was clearly a mutual dealing between the company and the assured which entitled the latter to have the accounts between them taken, and to bring in his claim against the company under the mutual credit clause.

Then comes the question under the deed of arrangement, which makes provision for the liquidation of current policies, and clause 2 of which provides for policies "which but for the said winding-up order would have matured between August 4, 1887, and August 4, 1890." The expression "would have matured" is a loose one, and does not apply to a case where the policy has matured on a fixed date which the assured has outlived. Then, by clause 11, all policy-holders who were policy-holders on August 4, 1887, are to accept the provisions of the deed in full satisfaction of their claims on the plaintiff company. Without deciding whether this clause is binding on any particular policy-holder, I am not satisfied that it amounts to a release of the defendant's claim against the company. He claims to set off his claim against that of the company; can it be contended that clause 11 operates to deprive a man of an existing right of set-off? I think not; and, as the defendant had such an existing right, I do not think that this clause applies.

I also agree that it is exceedingly doubtful whether this deed relates at all to a policy-holder in the position of the defendant. There never was a separate meeting of the class of policy-holders to which he belonged, and he ought not to have been mixed up with those whose policies had not matured. It is not contested that his policies had matured; the sum secured by them was due, and he had a claim to set off that sum in order to liquidate the sum due from him to the company. I think, therefore, that this deed of arrangement cannot be treated as a release by him of the debt due from the company.

Appeal dismissed.

Solicitor for plaintiffs: *J. Robinson.*
Solicitor for defendant: *N. Jourdain.*

W. J. B.

IN RE ALISON. EX PARTE JAYNES.

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May 19.

Bankruptcy—Small Bankruptcy—Adjournments of Public Examination—Costs—Taxation by County Court Registrar—Review by Taxing Master of High Court—Appeal—Jurisdiction—The Bankruptcy Rules, 1886, *rr.* 112, 124—*Appendix, Part II.—The Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 105.

Where the Board of Trade, under rule 124 of the Bankruptcy Rules, 1886, requires a taxation by a county court registrar to be reviewed by the bankruptcy taxing master of the High Court, the taxation of such bankruptcy taxing master may be reviewed by the judge in bankruptcy.

In a case where the assets were certified as not likely to realize 100*l.*, and the public examination of the debtor had been twice adjourned at the instance of the official receiver, the county court registrar, in taxing the bill of costs of the solicitor to the petitioning debtor, allowed 1*l.* 1*s.* for each adjournment in addition to the scale provided in Part II. of the Appendix to the Bankruptcy Rules, 1886:—

Held, that the solicitor was not entitled to the allowance.

But, *semble*, the county court judge could under s. 105 of the Bankruptcy Act, 1883, have made a special order as to costs.

THIS was an application to review the decision of the bankruptcy taxing master of the High Court, on a review of taxation by him under rule 124 of the Bankruptcy Rules, 1886. (1)

On November 18, 1891, the costs of Mr. Jaynes, as solicitor for the bankrupt, were taxed by the registrar of the county court. Upon such taxation the registrar allowed the following items in addition to the scale allowance of 3*l.*, viz.:—

	£	*s.*	*d.*
"November 17, 1891. Journey to Northallerton, attending on debtor's adjourned public examination	1	1	0
"November 20, 1891	1	1	0."

(1) Rule 124: "Where any bill of costs, charges, fees or disbursements of any solicitor . . . has been taxed by a registrar of a county court, the Board of Trade may require the taxation to be reviewed by a bankruptcy taxing master of the High Court."

Appendix, Part II., General Regulations, 18: "Any person who is dissatisfied with the certificate or allocatur of the taxing officer as to any item which may have been objected to as aforesaid may within fourteen days of the date of the certificate or allocatur . . . apply to the judge for an order to review the taxation as to the same item . . . and the judge may thereupon make such order as the judge may think just."

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The Board of Trade objected to the allowance of these items on the following grounds—

(*a*) That the assets were certified as not likely to realize 100*l.*

(*b*) That the said journeys were in attending the bankrupt's public examination.

(*c*) That the scale allowance of 3*l.* was inclusive, save as to court fees and other proper disbursements;

and gave Mr. Jaynes notice, pursuant to rule 124 of the Bankruptcy Rules, 1886, to have the taxation reviewed by the bankruptcy taxing master of the High Court.

On December 10, 1891, the taxation was reviewed by the bankruptcy taxing master, who disallowed the items but suspended his certificate, and gave Mr. Jaynes leave to have the review referred to the judge on condition that he gave his written undertaking to pay the costs of the Board of Trade up to five guineas if unsuccessful.

Mr. Jaynes refused to give this undertaking, and gave a notice of motion to review the taxation of the taxing master, and asking that the items disallowed might be reinstated.

Warriner (solicitor), for the motion.

Muir Mackenzie, for the Board of Trade. There is a preliminary objection that no appeal lies from the decision of the bankruptcy taxing master. It has always been considered that the General Regulations in Part II. of the Appendix to the Bankruptcy Rules, 1886, apply only to original taxations, and not to reviews of taxation under r. 124; and it has been the invariable practice under that rule to refer to the judge *by consent* reviews in which difficult questions of law arose, and to arrange as to the costs before the reference, as it has been thought that the judge upon such a reference would not have power to make any order as to costs. All the reported cases proceeded on this footing, and there is no authority for the procedure that has been adopted in this case, and it is submitted that the Court has no jurisdiction to hear this application.

Warriner, for the motion, relied on the General Regulations in Part II. of the Appendix to the Bankruptcy Rules, 1886.

VAUGHAN WILLIAMS, J. I overrule this objection. Although in strictness what the taxing master of the High Court does is to review the decision of the county court registrar and not to tax, yet I think the intention of the legislature was that, if the Board of Trade disapproved of the taxation by the county court registrar, they might have the bill re-taxed by the High Court taxing master. That is in substance a re-taxation in point of fact, and I think that then all the regulations in Part II. of the Appendix apply, and that an appeal lies as of course to the judge in bankruptcy. That being so, the solicitor here has taken all the necessary steps to bring the matter before me.

Warriner, for the motion. With regard to the items allowed to Mr. Jaynes the adjournments were not caused by him, but were taken to suit the convenience of the official receiver. The registrar knew all the circumstances and had a discretion in the matters. The principle of the decision in *Re Strand* (1) applies.

Muir Mackenzie, contrà. These costs are expressly provided for in the scale, and, even if the solicitor attended several adjournments of the public examination, he is only entitled to 1*l.* 1*s.*

Warriner, in reply.

VAUGHAN WILLIAMS, J. I am afraid that I must decide this case in favour of the decision of the taxing master of the High Court. I do so with great regret, because I cannot myself help thinking that, although the object of the legislature, and those who framed the rules, was to prevent extravagance in the matter of expenditure, it was not intended that, where the necessary work to be done was very largely in excess of that which ordinarily would have to be done, there should be no power in the Court to make any special order for costs. It appears in this case the solicitor had to attend again and again adjournments of the public examination, not for his own convenience, not for the convenience of any one for whom he was acting, but for the convenience of the official receiver; and it does seem to me that it could not have been the intention of the legislature, or of those who framed

(1) 1 Mor. 196.

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the rules, that under those circumstances no extra allowance for costs should be made at all. I am at the same time afraid that as matters stand I have no choice but to support the contention of the Board of Trade. No doubt it is the duty of the Board of Trade to see that these scales of costs are carried out, and I suppose that even in cases where it is apparently very undesirable that the scale should be applied with strictness, so far as the justice of the case is concerned, the Board of Trade is bound to keep a jealous eye and take care that the scale is enforced. It seems to me that inasmuch as in the present case no special order has been obtained I have no power to allow the solicitor any costs beyond those fixed by the scale. I do not know what the effect of this sort of contention will be; but I cannot suppose that solicitors and others, who are put in the position of having to attend again and again for the convenience of those whom they do not represent, will care to do so without receiving any remuneration at all for so doing. Whether the result will be that proceedings will be conducted without the assistance of those who are so treated I do not know. I should think it is not an improbable result; but, as matters stand, I can do nothing but hold that the view taken by the taxing master in London is right, having regard to the fact that no special order has been obtained. I wish it to be distinctly understood, however, that I say nothing as to whether the county court judge had not jurisdiction to make a special order, and whether he has not that jurisdiction now.

Solicitor for Board of Trade: *W. Murton.*
Solicitor for Mr. Jaynes: *Warriner & Kinch.*

H. L. F.

IN RE SARL. EX PARTE WILLIAMS. 1892 May 24.

Bill of Sale—"True Owner" of Chattels—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 5.

The "true owner" of the personal chattels described in a bill of sale at the time of its execution, within the meaning of s. 5 of the Bills of Sale Act, 1882, must be taken to include the person who is the legal owner thereof at that time, irrespective of whether he is also the equitable owner or only trustee for another.

THIS was an application by the trustee in bankruptcy claiming the proceeds of sale of certain chattels comprised in a bill of sale.

In March, 1890, the household furniture and effects of William Sarl at his private residence were seized by the sheriff under a writ of fi. fa. After the seizure the sheriff was requested on behalf of William Sarl to allow the goods to be sold by private contract to Mrs. Sarl, the wife of William Sarl, who would give 447*l.* for them. The sale was carried out under an order of the Court obtained for that purpose, and, on the 447*l.* being paid the sheriff, he signed the usual inventory and receipt in favour of Mrs. Sarl and handed the same to a Mr. Bevir, a solicitor, for her. The 447*l.* was not the money of Mrs. Sarl, but the money of William Sarl, and no part of it passed through her hands; and by the direction of William Sarl it was paid as to 160*l.* by his brother, and as to the balance of 287*l.* by Mr. Bevir, who took the receipt as above stated. Mrs. Sarl was not a party to this transaction except that the goods were purchased in her name, and, after the matter was completed, her husband informed her that he had bought the goods for her, and added, "The furniture is now yours."

On June 7, 1890, Mrs. Sarl, believing the furniture to be hers, executed a bill of sale in favour of the London Joint Stock Loan and Discount Company, Limited, to secure an advance then made to her of 280*l.*, repayable by monthly instalments with interest. Shortly before this William Sarl, being in failing health, had transferred his banking account into the name of Mrs. Sarl, and she paid the 280*l.* into the same account, and applied it in

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various payments on account of her husband and for the house-keeping expenses and for some of the instalments under the bill of sale.

In October, 1890, a receiving order was made against William Sarl, and on April 1, 1891, he was adjudicated bankrupt, and William Williams was appointed the trustee.

In February, 1891, the London Joint Stock Loan and Discount Company, Limited, seized the goods comprised in their bill of sale; and thereupon Mrs. Sarl applied to Mr. Tyler, a money-lender, for a loan of 275*l.* to pay off the London Joint Loan and Discount Company, Limited. Tyler consented to make the required advance on having a bill of sale of the same furniture and effects executed in his favour by Mrs. Sarl. This was done, and Tyler paid 273*l.* to the London Joint Stock Loan and Discount Company, Limited, and the balance of 2*l.* to Mrs. Sarl. On this occasion Mrs. Sarl executed a statutory declaration that the goods were her absolute property, and William Sarl also wrote Tyler a letter to the same effect. Tyler made the advance, and took the bill of sale bonâ fide in the usual course of his business and without any knowledge that William Sarl was insolvent.

In March, 1891, Tyler, at the request of Mrs. Sarl, sold all the goods comprised in his bill of sale. The sale realized 240*l.*, which was insufficient to pay him his principal, interest, and costs.

In May, 1892, the trustees served Tyler with a notice of motion, claiming the 240*l.* as part of the property of the bankrupt.

H. Reed, for the motion. Mrs. Sarl was not the "true owner" of the chattels within the meaning of the 5th section of the Bills of Sale Act, 1882 (1), when she executed the bill of sale: *Tuck* v. *Southern Counties Deposit Bank.* (2) She was really trustee or agent for her husband, and the purchase from the sheriff with

(1) 45 & 46 Vict. c. 43, s. 5: "Save as hereinafter mentioned, a bill of sale shall be void, except as against the grantor, in respect of any personal chattels specifically described in the schedule thereto of which the grantor was not the true owner at the time of the execution of the bill of sale."

(2) 42 Ch. D. 471.

Mr. Sarl's own money was intended to blind his creditors. The words "true owner" mean a person who is both legally and equitably entitled to the chattels.

Muir Mackenzie, for Tyler. There is no definition in the Act of the words "true owner," and there is no authority on the point. Tyler acted bonâ fide throughout. It is clear that the furniture was given to Mrs. Sarl, and she was in substance and in fact the true owner. There is no evidence of any scheme to defraud creditors. The words "true owner" must be taken to mean the true legal owner, no matter what the trust may be on which he holds the chattels.

H. Reed, in reply.

VAUGHAN WILLIAMS, J. I do not think the trustee is entitled in this case to the order for which he asks. Mr. Tyler is a professed money-lender and well able to look after himself, and he is not a person in whose favour the law is generally strained. But it is not because Mr. Tyler is a shrewd money-lender that he is not entitled to have his rights. In my judgment he is entitled to retain the proceeds of his bill of sale. Two points are made against him. First, it is said that Mrs. Sarl was not the "true owner" of the chattels at the time she executed the bills of sale. I am of opinion that she was. The Bills of Sale Act, 1882, contains no definition of the words "true owner." It does not say that those words mean a person who is both the legal and equitable owner. In my judgment, whatever those words may mean, they are satisfied by the grantor being the true legal owner of the chattels at the time of the execution of the bill of sale. Now here, in my opinion, there was an effective legal transfer of the furniture to Mrs. Sarl by the purchase from the sheriff. By that transaction the property in the furniture became legally vested in her. It may be that such a transaction might have been within the mischief of the statute of Elizabeth if she was a party to it. But it is not suggested here that she was, and the evidence does not support such a proposition. Therefore, under the circumstances, Mrs. Sarl was, in my judgment, the true owner of the goods at the date of the first bill of sale. If she once was the true owner, I do not think that the

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subsequent bankruptcy of her husband caused her to cease to be the true owner. If she was a trustee for her husband, to that extent she would become a trustee for the creditors of her husband. But then it is said that she had no right to deal with the goods on the occasion of the second bill of sale. Now, what are the facts? The money due under the first bill of sale fell in arrear, and the creditor seized the goods comprised in his security. Mrs. Sarl then applied to Mr. Tyler to advance her the money to pay off the first bill of sale, which he agreed to do. The transaction might have been carried through by a transfer of the first bill of sale to him. However, it was not done in that way, but he preferred to pay off the first bill of sale holder, and to take a fresh bill of sale to himself. I do not think it matters how the transaction was carried out. It was all one transaction, and it is not suggested that the money that was advanced was not applied for the benefit of the bankrupt's estate. Furthermore, the trustee in bankruptcy has stood by, and has allowed the legal owner of the chattels to deal with them, and the money that was obtained was employed in paying off the first mortgagee, and that money never could and never would have come to the bankrupt's estate. In my opinion this application of the trustee in bankruptcy must, under the circumstances, be dismissed with costs.

Order accordingly.

Solicitor for the trustee: *J. B. Digby.*
Solicitor for Mr. Tyler: *W. J. Greig.*

H. L. F.

GREAT NORTHERN RAILWAY COMPANY *v.* WINDER. 1892 *May* 12.

Railway—Passenger — Fare — Condition on Ticket—Ticket used for Station other than that for which it is available—Action to recover full Fare to Station at which Passenger alighted—Penalty.

The defendant, a passenger on the plaintiffs' railway, took a ticket to S., for which he paid 8*s.*; the ticket contained a condition that if used for any other station it would be forfeited and the full fare charged. He alighted at F., a station short of S., to which the fare was 9*s.*; he then took a ticket from F. to his destination on a branch line; he did not give up at F. the ticket he had originally taken. The plaintiffs brought an action in the county court, claiming to be entitled to recover 9*s.*, the full fare to F., or 1*s.* if the defendant was entitled to be credited with the 8*s.* paid by him for his original ticket; but they were nonsuited on the ground that they were suing for a penalty, which was only recoverable before justices:—

Held, that the plaintiffs were not suing to recover a penalty but to recover a fare under the terms of the contract entered into with the defendant; that the action was therefore maintainable and the nonsuit was wrong.

London, Brighton and South Coast Ry. Co. v. *Watson* (4 C. P. D. 118) distinguished.

APPEAL from a decision of the judge of the Leeds County Court.

The defendant took a tourist ticket on the plaintiffs' railway from Leeds to Skegness, the price of which was 8*s.*; the ticket contained a condition that if used for any other train or station than those named the ticket would be forfeited and the full fare charged. The defendant alighted at Firsby, a station short of Skegness—the ordinary single fare from Leeds to Firsby is 9*s.* At Firsby the defendant took a ticket to Spilsby, where he in reality wanted to go, for which he paid 4*d.*, the result being that he travelled from Leeds to Spilsby for 8*s.* 4*d.* instead of 9*s.* 4*d.*, the ordinary fare. He did not give up the tourist ticket at Firsby. The plaintiffs sued the defendant in the county court to recover the fare from Leeds to Firsby; by mistake the plaint was issued for 10*s.*, but it was admitted that the claim of the plaintiffs was 9*s.*, the amount of a single journey fare, or 1*s.* if the defendant was entitled to be credited with the money paid by him for the tourist ticket, which, however, he had not returned. It was objected on behalf of the defendant that this was in effect

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an action to enforce a bye-law, and that the plaintiffs must proceed before justices to recover a penalty, and the case of *London and Brighton Ry. Co.* v. *Watson* (1) was cited in support of that contention. The learned county court judge was of opinion that that case was applicable, and nonsuited the plaintiffs.

C. A. Russell, for the plaintiffs. The case cited is entirely different from the present. There the action was brought to recover the fare from the place where the train originally started, although the passenger had not got into the train there; that was the penalty affixed by the company's bye-law for travelling without a ticket, and the action was brought to enforce that bye-law; it was not an action of contract, for the passenger never took a ticket. The present action is one of contract, and is brought upon the terms of the special contract between the plaintiff and the defendant to recover the ordinary fare for the distance which the defendant actually travelled; it is in no sense an action to recover a penalty or to enforce a bye-law; there is, in fact, no bye-law of the plaintiffs' company applicable to such a state of facts. [He cited *Reg.* v. *Frere.* (2)]

The respondent did not appear.

DAY, J. There has been a clear misapplication of the word "penalty" by the learned judge. The appeal must be allowed; but as there is no finding by the county court judge of the amount due to the plaintiffs, and it is impossible in the absence of the respondent to come to an agreement on the fact, there must be a new trial.

CHARLES, J. I am of the same opinion.

Appeal allowed.

Solicitors for plaintiffs: *Nelson, Barr, & Nelson.*

(1) 4 C. P. D. 118. (2) 4 E. & B. 598; 24 L. J. (M.C.) 68.

W. J. B.

[CROWN CASE RESERVED.]

1892
Aug. 6.

THE QUEEN *v.* VILLENSKY.

Criminal Law—Receiving—Resumption of Possession by Owner after Theft and before Receiving.

A parcel was handed to the prosecutors, a firm of carriers, for conveyance to the consignees. While in the prosecutors' depôt, a servant of the prosecutors removed the parcel to a different part of the premises, and placed upon it a label addressed to the prisoners by a name by which they were known and at a house where they resided. The superintendent of the prosecutors' business, on receipt of information as to this, and after inspection of the parcel, directed it to be replaced in the place to which the thief had removed it, and to be sent, with a special delivery-sheet, in a van accompanied by two detectives, to the address shewn on the label. At that address it was received by the prisoners under circumstances which clearly shewed knowledge on their part that it had been stolen. The property in the parcel was laid in the indictment in the carriers, and an offer to amend the indictment by substituting the names of the consignees was declined. The prosecutors' servant pleaded guilty to a count for larceny in the same indictment:—

Held, that as the person in whom the property was laid had resumed possession of the stolen property before its receipt by the prisoners, it had then ceased to be stolen property, and the prisoners could not be convicted of receiving it knowing it to have been stolen.

Reg. v. *Dolan* (Dears. 436) followed.

Case stated by the Chairman of the County of London Sessions, from which the following facts appeared:—

Jacob Villensky and Mark Villensky were tried on an indictment charging them with having feloniously received two dozen nightgowns, the goods of Carter, Paterson & Co., before then feloniously stolen. George Clark, the actual thief, pleaded guilty to the first count in the same indictment charging him with the larceny of the same goods from Carter, Paterson & Co.

The goods in question were packed in a parcel consigned by Messrs. McIntyre, Hogg, Marsh & Co. of the City of London, to Messrs. Crisp & Co. of Holloway, and the parcel was delivered by the consignors to Carter, Paterson & Co., who are common carriers, for conveyance to the consignees. In the ordinary course it arrived at the Goswell Road depôt of Carter, Paterson & Co., and there, also in the ordinary course, it was (together with many other parcels) unloaded from the van in which it had

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been brought. George Clark, who pleaded guilty, was a carman in the employ of Carter, Paterson & Co., and took part in the unloading; his conduct in reference to this particular parcel excited the suspicion of a fellow-servant named Roberts, by whom he was seen to remove it from that part of the platform appropriated to Holloway parcels, and transfer it to the part appropriated to Spitalfields parcels. On examining the parcel, Roberts found on it a label addressed to "Jacobs & Co., Hanbury Street, Spitalfields." The prisoner, Jacob Villensky, resided and carried on business there as a chandler with the other prisoner, Mark Villensky (his son), and they were known by the name of Jacobs. Roberts reported to Mr. Waters, the superintendent of Carter, Paterson & Co., the finding of the parcel thus addressed.

The superintendent, having inspected the parcel, gave directions that it should be replaced in the Spitalfields part of the platform where Roberts had found it, and that a special delivery-sheet should be made out according to the label "Jacobs & Co., Hanbury Street, Spitalfields," and that the parcel should be forwarded in a van to that address, and by his further directions two detectives travelled in the van to Hanbury Street. It did not appear that either Mr. Waters or Roberts knew at this time who were the consignees to whom the parcel had been addressed, and neither the consignors nor the consignees were informed of the substitution of the false address, nor of the consequent action of Mr. Walters, nor was Clark, the thief, informed of it. The parcel was received by both the Villenskys in Hanbury Street under circumstances pointing clearly to the conclusion of complicity with Clark, and knowledge on their part that it had been stolen. Upon that point no question arose.

At the conclusion of the evidence, the learned chairman offered to amend the indictment by substituting the names of the consignees, Crisp & Co., as the owners of the property, for those of the bailees, Carter, Paterson & Co.; but the prosecution declined to ask for any amendment. It was then objected by counsel for the defence that there was no case to go to the jury, inasmuch as at the time the parcel was received by the Villenskys it had ceased to be stolen property, the bailees, Carter, Paterson & Co., having resumed actual possession of it. He

cited in support of his contention *Reg.* v. *Dolan* (1) and *Reg.* v. *Schmidt.* (2) The learned chairman overruled the objection, and the prisoners were convicted of felonious receiving, but were admitted to bail pending the decision of the present case.

The question for the opinion of the Court was whether upon the facts stated the objection was a valid one.

Slade Butler, (*Burnie*, with him), for the prisoner, after reading the case, was stopped by the Court.

G. M. Cohen, for the prosecution.

LORD COLERIDGE, C.J. This is, in my opinion, a perfectly plain case, and is concluded by the decision in *Reg.* v. *Dolan.* (1) There is no doubt that Clark stole these goods and the other two prisoners intended to receive them; but the carriers, in whose name those responsible for the prosecution insisted on the case going on, had in the meantime, before its receipt by the prisoners, got hold of the property, which, by their special directions, was sent off to the prisoners' house in a special van accompanied by two detectives. I must confess that I cannot conceive of a case of resumption of possession if this is not one.

A. L. SMITH, L.J. I am of the same opinion. The prisoners have been convicted of receiving stolen property knowing it to have been stolen, and the only question for us is whether at the time they received it it was stolen property. There is no doubt that Clark stole it; but after the theft the carriers resumed possession of the property, and delivered it to the persons who have been convicted of receiving it. On the authority of *Reg.* v. *Dolan* (1), and also I think on that of *Reg.* v. *Schmidt* (2), I think it clear that possession of the stolen property was resumed by the carriers.

POLLOCK, B. I agree. The decisions in *Reg.* v. *Dolan* (1) and *Reg.* v. *Schmidt* (2) are, in my judgment, founded on law and on solid good sense, and they should not be frittered away. It is, of course, frequently the case that when it is found that a person has stolen property he is watched; but the owner of the property,

(1) Dears. 436. (2) Law Rep. 1 C. C. 15.

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if he wishes to catch the receiver, does not resume possession of the stolen goods; here the owners have done so, and the result is that the conviction must be quashed.

CAVE, J. I am of the same opinion. It is impossible to distinguish this case from *Reg.* v. *Dolan* (1), which, in my judgment, is directly in point.

BRUCE, J. I am of the same opinion.

Conviction quashed.

Solicitor for prosecution: *Solicitor to the Treasury.*
Solicitor for prisoners: *D. A. Romain.*

W. J. B.

1892
Aug. 6.

[CROWN CASE RESERVED.]

THE QUEEN *v.* WAITE.

Criminal Law—Offences against the Person—Carnal Knowledge of Girl under Thirteen—Male under Fourteen—Criminal Law Amendment Act, 1885 (48 & 49 *Vict. c.* 69), *s.* 4.

A male under the age of fourteen years cannot be convicted under s. 4 of the Criminal Law Amendment Act, 1885, of the offence of carnal knowledge of a girl under the age of thirteen years.

CASE reserved by Wright, J.

Enos Waite, aged thirteen, was convicted at the Warwick Assizes of the felony of carnal knowledge of a girl under thirteen years of age—namely, eight years of age. The offence was fully proved. I passed sentence of two months' imprisonment and whipping; but I reserved this case on the question of law which arose at the trial, whether a male of less than fourteen years of age can be guilty of an offence against s. 4 of the Criminal Law Amendment Act. See, as to rape, *Reg.* v. *Groombridge* (2); *Reg.* v. *Phillips* (3); 1 Hale P. C. 631.

The prisoner is also sentenced to a concurrent term of imprisonment for two months upon an indictment for a common assault upon another girl of eight years of age. The sentence of

(1) Dears. 436. (2) 7 C. & P. 582.
(3) 8 C. & P. 736.

whipping will not be executed unless before the expiration of the two months the conviction for the felony is affirmed by the Court.

If the conviction for the felony is wrong, the punishment of whipping (which seems most appropriate to such cases) cannot be inflicted where the offence is committed by a male under fourteen.

Stubbins, for the prosecution. The authorities cited in the case and also the decision in *Reg.* v. *Brimilow* (1) undoubtedly shew that it has been the practice of judges sitting alone to hold that a male under fourteen cannot be guilty of the crime of rape, and the case of *Reg.* v. *Jordan* (2) shews that the same has been held as to the offence of carnal knowledge of a girl under ten. If that is sound law, and has not been altered by the Criminal Law Amendment Act, the prisoner could nevertheless have been convicted on the count charging the attempt, and would in that case still be liable to receive a sentence of whipping.

LORD COLERIDGE, C.J. The rule at common law is clearly laid down by Lord Hale, that in regard to the offence of rape malitia non supplet ætatem; a boy under fourteen is under a physical incapacity to commit the offence. That is a presumptio juris et de jure, and judges have time after time refused to receive evidence to shew that a particular prisoner was in fact capable of committing the offence. That is perfectly clear, and therefore, unless the Criminal Law Amendment Act has altered the common law, which cannot be successfully contended, this prisoner has not committed the felony charged. The question whether he could be convicted of the attempt does not arise; on that point *Reg.* v. *Brimilow* (3), though not in point, bears some resemblance to the present case; but it certainly seems to me that a person cannot be guilty of an attempt to commit an offence which he is physically incapable of committing; that question, however, can be dealt with when it arises. The conviction for the felony must therefore be quashed; but the prisoner will of course undergo the sentence of imprisonment on the conviction for assault, as to which there is no objection.

(1) 9 C. & P. 366. (2) 9 C. & P. 118.

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A. L. SMITH, L.J. I am of the same opinion. The authorities on the point are uniform. The question of the attempt does not arise, the conviction having been for the full offence.

POLLOCK, B., CAVE and BRUCE, JJ., concurred.

Conviction quashed.

Solicitor for prosecution: *Solicitor to the Treasury.*

W. J. B.

1892
Aug. 11.

IN RE AN ARBITRATION BETWEEN PREBBLE AND ROBINSON AND ANOTHER.

Arbitration—Costs — Taxation of Costs of Award — Amount of Costs not specified in Award—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 2, *Sched. I.* (*i.*)

By s. 2 of the Arbitration Act, 1889 (52 & 53 Vict. c. 49), it is provided that a submission to arbitration, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the first schedule to the Act, and by clause (*i*) of that schedule, "the costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom . . . . those costs, or any part thereof, shall be paid, and may tax or settle the amount of costs to be so paid, or any part thereof."

Held, that the amount of the costs to be so paid must be ascertained and stated in and by the award itself, and that otherwise the costs of the reference and award, including the arbitrators' fees, are liable to taxation in the ordinary course.

APPEAL from the decision of a taxing master referred to the Court by Bruce, J., at chambers.

By a building agreement made on February 25, 1891, between the defendants of the one part, and the plaintiff of the other part, it was provided that any dispute arising between them should be referred to two arbitrators or their umpire, "pursuant to and so as with regard to the mode and consequences of the reference, and in all respects to conform to the provisions in that behalf contained in the Common Law Procedure Act, 1854, or any then subsisting statutory modification thereof."

A dispute having arisen under the agreement, each party appointed an arbitrator, who in turn appointed an umpire. After hearing evidence on both sides the umpire on May 19, 1892, sent the following notice to both parties: "In the matter of an arbitration between A. Robinson & G. Fisher, and W. Prebble. I hereby give you notice that I have this day made and published

my award of and concerning the above matter, and that the same now lies at my office ready for delivery upon payment of 153*l.* 16*s.* 8*d.*, being the arbitrators' and my charges and the costs of the preparation of my award."

The award directed that the defendants should pay a certain sum to the plaintiff in satisfaction of all demands, and further directed that the defendants should pay to the plaintiff the costs incurred by him "of and incidental to the reference and award."

The award was taken up by the plaintiff, who accordingly paid to the umpire the sum of 153*l.* 16*s.* 8*d.* on so doing. On the taxation of the plaintiff's costs the master thought that, on the authority of *In re an Arbitration between Stephens, Smith & Co. and Liverpool and London and Globe Insurance Co.* (1), he had no power to tax this item, and on appeal Bruce, J., referred the question to the Court.

Moyses, for the defendants. The master had power to tax this item. *In re an Arbitration between Stephens, Smith & Co. and Liverpool and London and Globe Insurance Co.* (1) is entirely distinguishable from the present case. In that case the arbitrator had fixed the amount of the costs of the award in the award itself, and there was an application to set aside so much of the award as related to the costs, which the Court refused to do on the ground that the applicant had not shewn such misconduct on the part of the arbitrator as would justify the setting aside of the award. [He was stopped by the Court.]

F. Marshall, for the plaintiff. By clause (*i*) of Schedule I. of the Arbitration Act, 1889 (52 & 53 Vict. c. 49): "The costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom and in what manner those costs, or any part thereof, shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client." That provision applies to the present case, since it was not excluded by the terms of the submission, and the umpire, in pursuance of it, has settled the amount of the costs of the award. It is true that he did not state that amount in the award itself, but he stated it in the

(1) 36 Sol. J. 464.

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IN RE PREBBLE AND ROBINSON.

notice he sent to the parties, and by using the words "tax or settle the amount of costs" the legislature must be taken to have contemplated a taxation or settling of the costs after the making of the award. It is clear from *In re an Arbitration between Stephens, Smith & Co. and Liverpool and London and Globe Insurance Co.* (1) that if the umpire had stated the costs of the award in the award itself there would have been no power to review those costs, and the fact that he did so in the notices he gave does not make them more liable to taxation.

LORD COLERIDGE, C.J. I cannot help thinking that, in submissions to arbitration, it is desirable that persons should know that resort may be had to the provisions of s. 2 of the Arbitration Act, 1889, and that an intention may be expressed in them that the provisions of clause (*i*) of the 1st schedule shall not be applicable. The effect of that clause is to make arbitrators and umpires judges in their own cause, and to allow them to settle finally the amount of costs to be paid to them. In the present case we have to see whether that clause applies. To my mind it is tolerably clear that it does not, and that this item of 153*l.* 16*s.* 8*d.* is subject to taxation. The master thought that he was prevented from taxing it by reason of the case which has been cited. But that case was a very different one to this. There the very words of clause (*i*) of Schedule I. of the Arbitration Act were most carefully followed, and the arbitrators did tax and settle the amount of the costs of the award, and made that amount a part of the award itself. The application, therefore, in that case was an application to set aside so much of the award as related to the costs of the award, and not, as here, to tax the arbitrators' charges. The judges in that case held that there had not been such misconduct on the part of the arbitrator as would justify the Court in setting aside the award. It is, I think, an open question whether an excessive and extravagant charge by an arbitrator, made by him in the award as part of the award, might not amount to such misconduct as would justify the Court in setting that award aside. I am far from saying that it might not. The present case is, however, entirely distinguishable from

(1) 36 Sol. J. 464.

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Lord Coleridge, C.J.

In re an Arbitration between Stephens, Smith & Co. and Liverpool and London and Globe Insurance Co. (1) Here the umpire's charges were not ascertained and fixed in the award itself. They appear for the first time in the notice sent by the umpire to the parties. That is just what would have happened before the passing of the Arbitration Act, 1889. Before that Act, it is clear that such charges were subject to taxation; and if the Act had not been passed, they would, therefore, be taxable in the ordinary course. I think, therefore, that since the charges are not included in the award, they are subject to taxation, and they must be referred to the master for that purpose.

CAVE, J. I am of the same opinion. The provision in Schedule I. (*i*) of the Arbitration Act, 1889, is as follows: "The costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom and in what manner those costs, or any part thereof, shall be paid." That was a common provision in references before the Act; but it was always necessary that the direction as to costs should form part of the award itself, and there was no power to give any direction as to costs after the award had been made. But then the clause goes on: "And may tax and settle the amount of costs to be so paid, or any part thereof, and may award costs to be paid as between solicitor and client." That is a new power conferred upon arbitrators by the Act; but there is no indication that it was intended to give them power to deal with the costs after they have made their award. The power is coupled with the old power to deal with costs, which was uniformly exercised in and by the award. In my opinion this new power, unless exercised in and by the award itself, cannot be exercised at all; and the charges of the arbitrator, if not fixed in the award itself, are liable to taxation just as they were before the passing of the Act. I therefore agree in thinking that these charges are subject to taxation, and must be sent back to the master in order that he may tax them.

Appeal allowed.

Solicitor for plaintiff: *Marshall & Marshall.*
Solicitor for defendants: *W. H. Lydall.*

(1) 36 Sol. J. 464.

A. P. P. K.

1892
June 14.

THE LONDON COUNTY COUNCIL *v.* THE SCHOOL BOARD FOR LONDON.

Metropolis—Building Acts—Compulsory Purchase of Land by School Board—Right to Build within prescribed Distance of Centre of Roadway—Inconsistent Enactments—Elementary Education Act, 1870 (33 & 34 *Vict. c.* 75), *ss.* 19, 20—*Metropolis Management and Buildings Acts Amendment Act*, 1878 (41 & 42 *Vict. c.* 32), *ss.* 4, 6.

By s. 19 of the Elementary Education Act, 1870, power is given to a school board to purchase land for the purpose of providing sufficient public school accommodation for their district, and by s. 20 the Education Department may make a provisional order authorizing a school board, subject to confirmation of the order by Act of Parliament, to put in force the powers contained in the Lands Clauses Consolidation Acts with reference to the purchase of land otherwise than by agreement. The school board for London, acting under the powers of the Elementary Education Act, 1870, and of a special Act confirming a provisional order, compulsorily acquired a piece of land for the purpose of providing sufficient public school accommodation, the land being defined by metes and bounds in the schedule to the special Act. The school board then built upon the land a school with a playground attached, the external fence of the playground being within twenty feet of the centre of a public highway:—

Held, that the provisions of ss. 4 and 6 of the Metropolis Management and Buildings Acts Amendment Act, 1876, which forbid the erection without the consent of the Metropolitan Board of Works of any building, wall, or fence within twenty feet of the centre of a highway, were inconsistent with the statutory powers given to the school board for the acquisition and user of the land, and that the school board could therefore use the land for the statutory purposes for which it was acquired free from the restrictions imposed by those provisions.

Special case stated by a metropolitan police magistrate, from which the following facts appeared:—

The respondents were summoned to answer a complaint on the part of the appellants that they had unlawfully made default in setting back the external fence or boundary of the forecourt or other space in front of a certain building to a distance of twenty feet from the centre of Bishop's Road, Fulham, and had thus unlawfully failed to comply with the requirements of a lawful and valid notice in writing signed by the clerk of the London County Council, and served on the respondents, contrary to 41 & 42 Vict. c. 32, ss. 6, 8, and 51 & 52 Vict. c. 41.

Upon the hearing of the summons the following facts were proved :—

(1.) The School Board for London was the school board appointed under s. 37 of the Elementary Education Act, 1870, for the school district of the metropolis as defined by that Act.

(2.) In or about April, 1883, the school board, acting under and in pursuance of the powers conferred upon it by the Education Department Provisional Order Confirmation (London) Act, 1881 (44 & 45 Vict. c. clxvii.), purchased and took a triangular piece of land in the parish of Fulham, bounded on the east by a public highway called Filmer Road, on the south-west by a public highway called Munster Road, and on the north-west by a public highway called Bishop's Road. (1)

(3.) Previously to the passing of the Metropolis Management and Building Acts (Amendment) Act, 1878 (41 & 42 Vict. c. 32), Bishop's Road was a public highway.

(4.) Upon the said piece of land the school board had, in pursuance of its statutory powers, erected and provided a school-house. By s. 3 of the Elementary Education Act, 1870, the term "school-house" includes the teacher's dwelling-house and the playground (if any), and the offices and all premises belonging to or required for the school, and the school board in providing the said school-house had provided a playground thereto, and for that purpose had erected on the land adjoining Bishop's Road a fence, which was the external fence or boundary referred to in the complaint and was erected at a distance of less than twenty feet from the centre of the roadway of Bishop's Road.

(5.) The school-house had been erected and provided in accordance with the rules (dated February 6, 1891) prescribed by the Education Department to be observed in planning and filling up public elementary schools in pursuance of the Elementary Education Act, 1870, and the Acts amending the same, and the school-house was necessary in order to provide sufficient public school accommodation for that portion of the district of the school board in which it was situate, and if the fence was set back so as to add any portion of the said piece of land to

(1) There was a separate complaint in respect of each of the three roads.

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Bishop's Road the playground would not be sufficient to comply with the recommendations of the rules and provide the area of playground required by the rules for the number of children for whose accommodation the school-house was required and had been erected and provided.

(6.) The front of the school building was in Filmer Road.

(7.) On or about December 9, 1891, the appellants duly served the respondents with notice requiring them to comply with the provisions of s. 6 of the Metropolis Management and Building Acts Amendment Act, 1878 (41 & 42 Vict. c. 32), in respect to the said fence.

(8.) No consent in writing was given by the council to the school board for the execution of the fence at a distance from the centre of the roadway of less than twenty feet.

On behalf of the school board it was contended that they, having been empowered by 44 & 45 Vict. c. clxvii. to take the land upon which the school-house had been erected for the purposes of the Elementary Education Act, 1870, any enactment inconsistent with the use of the land for such purposes was inapplicable with reference to such land, and that since the effect of enforcing the provisions of the Metropolis Management and Building Acts Amendment Act, 1878, in respect of the said land would be to require the school board to reduce the area of the playground so as to render it insufficient for the provision of sufficient school accommodation, and would also be to require the school board to dedicate a portion of the said land as and for a highway, the said provisions of the said Act were inconsistent with the use of the land for the purposes of the Elementary Education Act, and that s. 6 of the Act of 1878 was repealed in so far as it related to the said land so long as the land was used for the purposes of the Act of 1870 and the Acts amending the same. It was also contended by the said board that the fence was not the external fence or boundary of a forecourt or space left in the front of any building erected on the said lands, and also that Bishop's Road was a street existing at the time of the passing of the Act of 1878 within the meaning of the proviso to s. 6 of that Act, and that the preceding provisions of that section were therefore inapplicable to the erection of the said fence.

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On behalf of the council it was contended that the school board in building the external fence or boundary of the forecourt or other space were not so exempt from the provisions of ss. 6 and 8 as claimed by the said board.

The learned magistrate dismissed the summons upon the ground that Parliament having sanctioned the taking of the ground for the purposes of the Elementary Education Act, 1870, the school board was entitled and bound to use the whole of the ground so taken for the purposes of the said Act, and that the Provisional Order Confirmation (London) Act, 1881, repealed s. 6 of 41 & 42 Vict. c. 32, so far as it related to the said land.

The county council appealed.

Lumley Smith, Q.C. (*Biron*, with him), for the appellants. The school board are not exempt from the necessity imposed upon building owners generally by the Metropolis Management Amendment Act, 1878, of setting back new buildings to the prescribed distance from the centre of a roadway. The Elementary Education Act authorizes a school board to acquire land by means of a provisional order; the board may then acquire land compulsorily; but having done so, it is then in the same position as if it had acquired it by agreement; it has no greater rights than an ordinary owner, and can only build subject to the provisions of the Metropolis Management and Building Acts. It is immaterial that the effect will be that the school board will be unable to comply with the rules of the Education Department; those rules are mere recommendations, and have no statutory authority. There is no inconsistency in the provisions of the two Acts, which are harmonized by the interpretation contended for by the school board. The case of *City and South London Ry. Co.* v. *London County Council* (1), which was relied upon by the respondents before the magistrate, is not an authority in their favour; it turned upon the special language used in a railway company's special Act, to which there is no equivalent in the present case. The school board has no power even to build the school-house on such part of the land as is within twenty feet of the roadway, much less to use the land as a

(1) [1891] 2 Q. B. 513.

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playground, which it is not obligatory upon them to provide at all.

R. Cunningham Glen, for the respondents. The school board has power to acquire land only for the purpose of building a school-house, which includes a playground; and the provisional order amounts to a power to take the particular piece of land named in it and use it for that purpose. The land is described in the schedule by metes and bounds, and the whole of the land was necessary for the purpose for which it was acquired; the magistrate could not go behind the provisional order to shew that it was not necessary. The two Acts are inconsistent, and the case is governed by the decision in *City and South London Ry. Co.* v. *London County Council* (1), the effect of which is that the school board has a discretion to say how the land is to be used, provided it is used for the purposes authorized by the Act of Parliament. In *Clark* v. *School Board for London* (2), Lord Selborne says: "I cannot but think that the legislature intended the school board to have the full benefit of all the provisions connected with the compulsory clauses of the Lands Clauses Consolidation Act, so that they might, according to their judgment and discretion (acting bonâ fide), erect such buildings on such a space of ground, of such magnitude, and so situated on any lands acquired by them, as they might think proper for the public trust with which they have been charged .... These are very large powers; and they appear to me to shew that the intention of the legislature was to give the land which is required to the school board absolutely free from any jus tertii which would control their dominion over it for the purpose of the duty which they have to discharge."

A statutory body like the school board has no power to dedicate to the public land which they have purchased under statutory powers, where such dedication would be inconsistent with the statutory purpose for which the lands have been acquired: *Mulliner* v. *Midland Ry. Co.* (3)

Lumley Smith, Q.C., in reply.

(1) [1891] 2 Q. B. 513. (2) Law Rep. 9 Ch. 120.
(3) 27 W. R. 330.

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WRIGHT, J. I am of opinion that the decision of the learned magistrate was right. The principle of the decision in *City and South London Ry. Co.* v. *London County Council* (1), is applicable to the present case. By s. 18 of the Elementary Education Act, 1870, it is the duty of the school board to provide sufficient accommodation in public elementary schools; that accommodation must include school-houses, and by s. 3 may include playgrounds; s. 19 expressly gives them power to purchase land for the purpose of providing sufficient school accommodation. Then s. 20 deals with the formalities to be observed in the case of the compulsory acquisition of land; it provides for the publication of notices as to the quantity, &c., of land required, for the service of notices on owners, for the presentation of a petition to the Education Department for an order authorizing the school board to put in force their compulsory powers for the acquisition of land, for the holding of a public inquiry by the Education Department, and for the confirmation by an Act of Parliament of the order made by the department. Whether the county council would have any locus standi to appear and oppose the confirmation by Act of Parliament of a provisional order we are not informed; but construing the sections of the Elementary Education Act, 1870, and the Confirmation Act of 1881, it seems clear that the school board had power to purchase the whole of this site, and (bearing in mind the decision in *City and South London Ry. Co.* v. *London County Council* (1)) to apply any part of the land to an authorized school purpose, provided, of course, that in so doing they were acting in good faith. Pro tanto, therefore, these provisions amount to a limitation on the provisions of the Metropolis Management and Buildings Act, and the case is one where a general enactment is overridden by special provisions with which it cannot stand. It seems to me that there is necessarily an inconsistency between two Acts of Parliament dealing with the same strip of land, one of which says that it must be thrown open to the public to form part of a street, while the other says that a school-house may be built upon it. I think, therefore, that the decision of the learned magistrate must be affirmed. I give no opinion upon the point whether, if a school

(1) [1891] 2 Q. B. 513.

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board, instead of putting in force its compulsory powers, were to negotiate for the purchase of land by agreement, it would be subject to the provisions of the Metropolis Management and Buildings Act, though I think that there would be great difficulty in saying that they were in any better position than ordinary landowners.

COLLINS, J. I am of the same opinion. The case is indistinguishable in principle from that of the *City and South London Ry. Co.* v. *London County Council.* (1) It was there held that there was an inconsistency between the special Act under which the railway company derived its power and the provisions of the general Act. What was the power given by the special Act in that case? It was to make and maintain a subway, "with all necessary approaches, tunnels, shafts, hydraulic lifts, buildings, works, machinery, and conveniences connected therewith, and to take and use such of the lands delineated on the deposited plans and described in the deposited book of reference as may be required for that purpose," and the question was whether those words gave the railway company power to determine upon what part of the land they should build their station. It was conceded in the argument of that case that if the company had such power they were within their rights in placing the station where they had; but it was contended that, inasmuch as the station might physically have been placed upon another part of the land, it could not be considered to be "necessary" in the position where it was built, and was therefore not exempted from the operation of the Metropolis Management Act. The Court of Appeal, however, held that, under their special Act, it was for the company themselves to determine where the station should be placed, and that on the finding of the magistrate on the facts of the case they were right in placing it where they had done. In the present case there is no specific section applicable to this particular school-house; but there is the equivalent of such a section in ss. 18 & 19 of the Elementary Education Act. Under s. 19 the school board takes power to purchase land, and to purchase it for the purpose of providing sufficient school accommodation,

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Collins, J.

as required by s. 18; the land has been acquired by them under the statutory powers; what is there to fetter them in its use? Nothing, except that it must be used for the purpose of providing sufficient public school accommodation as required by s. 19. The scheme of the Act therefore is, that for the purpose of supplying sufficient school accommodation a school board may acquire land, and on that land they may put that which is necessary to constitute sufficient school accommodation; they may by virtue of s. 3 use a portion of it for a playground. The magistrate has, I think, found that this playground was practically necessary in the same way in which Lindley, L.J., in *City and South London Ry. Co.* v. *London County Council* (1), regarded the station building and approaches as being necessary. The two cases are, I think, really indistinguishable, and the decision must be affirmed.

Appeal dismissed; leave to appeal.

Solicitor for appellants: *W. E. Blaxland.*

Solicitor for respondents: *C. E. Mortimer.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.

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July 5, 11; *Aug.* 8.

IN RE AN ARBITRATION BETWEEN KNIGHT AND THE TABERNACLE PERMANENT BUILDING SOCIETY.

Practice—Arbitration—Special Case stated by Arbitrators—Appeal—Costs of Special Case—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 19.

No appeal lies from the decision of the High Court upon a special case stated by an arbitrator with regard to a question of law arising in the course of the reference under s. 19 of the Arbitration Act, 1889.

Except so far as there may be power under s. 20 of the Act to impose terms as to costs on making an order for the statement of a special case, the Court has no power to make an order as to the costs of a special case under s. 19.

APPEAL from the decision of a Divisional Court upon a special case stated by arbitrators.

The facts were as follows: A dispute, which had arisen between a member of a building society named Knight and the society, was referred to arbitration under the Building Societies Act, 1874. During the arbitration a request was made to the arbitrators,

(1) [1891] 2 Q. B. 513.

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on behalf of Knight, to state a special case for the opinion of the Court upon a question of law which had arisen in the course of the proceedings, viz., whether the society had power to make certain alterations in their rules so as to bind Knight, who had not assented thereto. The arbitrators refused to do so. Thereupon an order was obtained, under s. 19 of the Arbitration Act, 1889, directing the arbitrators to state a special case for the opinion of the Court. See [1891] 2 Q. B. 63.

A case was accordingly stated, by which the opinion of the Court was asked on the question whether the society had power to make the alterations of their rules in question so as to bind Knight. This case came before the Divisional Court (Grantham and Charles, JJ.), who decided the question raised by the case in favour of Knight, and gave him costs.

Against this decision the society appealed.

Fillan, (*Lincoln Reed*, with him), for the respondent, Knight, took the preliminary objection that no appeal lay. This special case was stated under the Arbitration Act, 1889, s. 19, which provides that any arbitrator may at any stage of the proceedings under a reference, and shall, if so directed by the Court or a judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference. The opinion given by the Court upon such a case is not a "judgment or order" of the Court within s. 19 of the Judicature Act, 1873. The ground on which this Court ordered the case to be stated was that the decision of the case would be merely by way of instruction to the arbitrator: *In re Knight and Tabernacle Permanent Building Society.* (1) The case comes within the decision of this Court in *Ex parte County Council of Kent.* (2) The jurisdiction of the Court in deciding the question raised by a special case under the Arbitration Act, 1889, is consultative only. Practically, of course, the arbitrator would make his award in conformity with the opinion given by the Court; but he is under no legal obligation to do so.

Cozens-Hardy, Q.C., and *Macoun*, for the appellants. The judgment in *Ex parte County Council of Kent* (2) turned on the

(1) [1891] 2 Q. B. 63. (2) [1891] 1 Q. B. 725

language of the 29th section of the Local Government Act, 1888, which is peculiar, and which provides for the decision by the Court not only of questions which have arisen, but of questions which are about to arise. Here the decision given was upon a case which the Court ordered to be stated, and in substance it is a judgment which determines the rights of the parties. It would be absurd that the Court might order a case to be stated, and that the arbitrators could, nevertheless, disregard their decision upon it.

[LORD ESHER, M.R. The arbitrators may, under s. 19 of the Arbitration Act, 1889, voluntarily state a case. The question whether there is an appeal must depend on the same considerations, whether they state the case voluntarily, or are directed to do so.]

It was held in *Bidder* v. *North Staffordshire Ry. Co.* (1), following *Rhodes* v. *Airedale Drainage Commissioners* (2), that there was an appeal from the decision of the High Court of Justice on a special case stated under the Lands Clauses Consolidation Act, 1845.

[BOWEN, L.J. The distinction appears to be between cases where the jurisdiction is consultative merely, and where it is effective. Those cases arose under the Common Law Procedure Act, which empowered the arbitrator to state his award in the form of a special case. Where an arbitrator has power by his award to state the facts and submit them for the judgment of the Court, it may be said that there the decision of the Court is the effective decision which determines the rights of the parties.]

It is contended that substantially that is the case here.

[LORD ESHER, M.R. Under this section the case may be stated at any period of the reference. Suppose, when the Court had decided a case, the arbitrator, on going further into the facts, found that they were different from those stated, and the question raised by the case did not arise, could he not decide accordingly?]

That case would not, it is submitted, be very likely to happen in practice. In *Ex parte Dawes* (3) it was held that an appeal

(1) 4 Q. B. D. 412. (2) 1 C. P. D. 402. (3) 17 Q. B. D. 275.

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lay to the Court of Appeal from the decision of the High Court upon a special case for its opinion, stated by a county court sitting in bankruptcy, under sub-s. 3 of s. 97 of the Bankruptcy Act, 1883, the words of which are very similar to those of s. 19 of the Arbitration Act, 1889.

[LORD ESHER, M.R. By the terms of the Bankruptcy Act the High Court is to "determine" the question.

BOWEN, L.J. The effect of that section is, that the matter in question is transferred from the county court to the High Court, to be there determined in the first instance.]

[They also cited on this point *Jones* v. *Victoria Graving Dock.* (1)]

Secondly, the Court below have given costs to the respondent. There was no power to do so. The order directing the statement of the special case was silent as to costs. If the contention of the respondent on the first point be correct, and the Divisional Court had no power to make an order in the matter, then à fortiori it had no power to give costs. The arbitrators would be the tribunal to deal with the costs of the special case under the provisions of the schedule to the Arbitration Act.

Fillan, in reply. The Divisional Court had power to give costs under s. 5 of the Supreme Court of Judicature Act, 1890 (53 & 54 Vict. c. 44), which provides, that "subject to the Supreme Court of Judicature Acts and the Rules of Court made thereunder, and to the express provisions of any statute, whether passed before or after the commencement of this Act, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge, and the Court or judge shall have full power to determine by whom and to what extent such costs are to be paid." The special case was a "proceeding" within this section. The Arbitration Act does not provide for the costs of a special case stated under it. The costs of the special case are not "costs of the reference or award." The Arbitration Act, 1889, only speaks of "costs of the reference and award," not of costs incidental thereto. Sect. 20 of that Act gives power when the order for the statement of the case is made, to impose terms as to costs; but that was not done here. There-

(1) 2 Q. B. D. 314.

fore, the case is left within the Act of 1890. [He cited *In re Holliday and Mayor, &c. of Wakefield.* (1)]

Lord Esher, M.R. The question is whether there is any appeal from the opinion given by the Divisional Court upon this special case. That question depends upon an accurate consideration of the language of the section under which the case is stated. In the bankruptcy case to which our attention was directed, the statute spoke of a question of law to be determined by the Court. It was held that, although the Act did not in terms provide for any judgment or order of the Court, inasmuch as the Court was to determine the matter, there was what was equivalent to a judgment or order of the High Court. In the case of *Ex parte County Council of Kent* (2), where a statute provided that a case might be stated for the decision of the Court, it was held that, though that language might primâ facie import that there was to be the equivalent of a judgment or order, yet, when the context was looked at, it appeared that the jurisdiction was only consultative, and that there was nothing which amounted to a judgment or order. The enactment now in question provides that "any referee, arbitrator, or umpire may at any stage of the proceedings under a reference, and shall, if so directed by the Court or a judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference." The words are not "for the 'determination' or 'decision' of the Court"; so that there is not the primâ facie difficulty which existed in the case where the statute spoke of the "decision of the Court." It appears to me that what the statute in terms provides for is an "opinion" of the Court to be given to the arbitrator or umpire; and that there is not to be any determination or decision which amounts to a judgment or order. Under those circumstances, I think that there is no appeal. I base my decision on the words of the statute; but when I consider the result of holding otherwise, I am fortified in the conclusion at which I have arrived. It seems to me that it would be most inexpedient that, where an opinion is given by the Court under this statute in the course of a reference for the

(1) 20 Q. B. D. 699, 720. (2) [1891] 1 Q. B. 725.

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guidance of arbitrators, there should be an appeal which might be carried up to the House of Lords.

Then comes the question as to the costs. It was argued by the counsel for the respondent that this was a proceeding within the meaning of the Supreme Court of Judicature Act, 1890, s. 5. When we look at s. 5 of that Act, we find that its provisions are subject to the express provisions of any other statute. There is a previous Act which deals with the whole subject of arbitration, and by which all matters in respect of arbitrations are to be governed. So far as that Act is applicable, the provisions of the Supreme Court of Judicature Act, 1890, do not apply, and we must look to the Arbitration Act, 1889, only. There are certain orders which under that Act may be made by the Court or a judge, and the Act provides that any such order may be made on such terms as to costs or otherwise as the authority making the order thinks just. Therefore, when the order for a special case was made, terms as to costs might have been imposed. But such terms must be imposed when the order is made, and, if the Court or judge, on making the order, imposes no terms, the matter is left to be dealt with by the arbitrator as costs of the arbitration under the Arbitration Act, 1889. I do not think that the Divisional Court had any power to make the order which they did as to costs. Therefore, the appeal from the opinion of the Divisional Court must be dismissed; but, as they had no power to give costs, the direction they gave as to costs must be struck out.

Bowen, L.J. I am of the same opinion. The arbitrator is a person whom the parties have chosen as judge both of law and fact with regard to the matter submitted to him. The Arbitration Act, 1889, in order to assist arbitrators, has given power to an arbitrator to take the opinion of the Court in two ways. He may state his award in the form of a special case. When that is done, the arbitrator has exhausted his powers; he has made his award in such a shape that the opinion of the Court will determine the rights of the parties, and turn the award into one groove or the other. Therefore the opinion of the Court is, in that case, an effective determination of the rights of the

parties. I do not doubt that in such a case there might be an appeal from the decision of the Divisional Court upon a special case. But there is another way in which an arbitrator may, during the arbitration, take the opinion of the Court. Under s. 19, he may voluntarily take, or by order of the Court or a judge he may be compelled to take, by means of a special case, the opinion of the Court for his guidance, and as a step for arriving at his own ultimate award in the matter. That is an interlocutory proceeding in the reference, and I do not think that it can have been intended that, whenever a case is stated under this section for the opinion of the Court, such opinion when taken is to be treated as an absolute determination of the rights of the parties with the result that there may be an appeal from it which may be carried to the House of Lords. If that were so, the opinion of the Court might be carried to the House of Lords, though it ultimately decided nothing. It might turn out that, after the point of law had been carried to the House of Lords, it did not really arise. That is one reason, but not the only reason, for the conclusion that the jurisdiction of the Court under this section is consultative only. The section contemplates a proceeding by the arbitrator for the purpose of guiding himself as to the course he should pursue in the reference. He does not divest himself of his complete authority over the subject-matter of the arbitration. He still remains the final judge of law and fact. No doubt a fair and honest arbitrator would, in the absence of special circumstances, be bound in honesty and morality, after taking the opinion of the Court, to act upon such opinion. If he did not, it would at any rate be a matter calling for explanation on his part. But the arbitrator is still clothed with the final duty of determining the case. The opinion of the Court does not finally determine the case; it only binds the arbitrator in honesty or morals to act upon the law as the Court states it. There could be no appeal from his decision because he did not do so, although it might be a ground for impeaching his award on the ground of misconduct if he did not. It appears to me that this consultative jurisdiction of the Court does not result in a decision which is equivalent to a judgment or order.

As to the other point, as to the costs, I agree with the

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Master of the Rolls, for the reasons which he has given, that the Divisional Court ought not to have dealt with the costs of the special case. It was suggested that this special case was a "proceeding" in the High Court. It is not necessary to decide whether that was so or not. Under the Supreme Court of Judicature Act, 1890, s. 5, all matters are left untouched which are already dealt with by previous legislation. Therefore, if this matter is dealt with by the Arbitration Act, 1889, it is not within the Judicature Act, 1890. There is a provision in the Arbitration Act, 1889, that the costs of the reference and award shall be in the discretion of the arbitrators or umpire. I think the legislature in framing this clause of the Arbitration Act, 1889, must have meant to include all the costs which would have been included by the well-known phrase applicable to such matters, "costs of and incidental to the reference and award."

Therefore I think that these costs would primâ facie be in the discretion of the arbitrator. If the parties come to the Court to compel the arbitrator to state a case under s. 20, the Court has a special power conferred on it to impose terms; and it might have said that it would not grant the order for a special case except on terms as to costs. But the Court has no power to make any order as to costs, unless it makes one at the time of making the order for the case. The power to impose such terms was in this case left unexercised; but nothing occurred to destroy or limit the power of the arbitrator to deal with these costs. For these reasons, I think that the order of the Divisional Court as to costs was wrong.

KAY, L.J. I come to the same conclusion on both points. With regard to the first point, I am much influenced by the consideration that the Act now in question relates to arbitrations. One of the advantages of arbitration is that the award of the arbitrator is final and there is no appeal from it. Therefore, where an Act dealing with arbitration gives an incidental power to an arbitrator to state a case or to the Court to compel him to state one for the opinion of the Court, I should expect, if it were intended that the opinion expressed by the Court on that case should be the subject-matter of appeal, that such an intention would be

most explicitly stated in the Act. There is nothing of the kind in this Act. Accordingly it is sought to make out that there is an appeal under the provisions of the Judicature Act which give an appeal from any "judgment or order" of the High Court. I think that it is impossible, looking to the language of the Arbitration Act, to say that the opinion given on the special case stated under s. 19 is a judgment or order. I do not think that the section contemplates that the Court should give any judgment or make any order, but simply that it should express an opinion. The Master of the Rolls has pointed out the extraordinary consequences which would follow if there were an appeal from the opinion of the Court. The award of an arbitrator is in its nature supposed to be final. But consider what a mass of litigation might arise if, when an arbitrator of his own accord stated or was compelled to state one or more cases on points of law in the course of a reference, there might in each case be an appeal which could be carried to the House of Lords. A case might be stated in the early part of an arbitration on a point of law which, on the facts as then appearing to the arbitrator, might seem material; but afterwards, when the facts were further ascertained, it might appear that the point was immaterial. It is obvious that in a heavy arbitration a great deal of useless and costly litigation might arise if, on a case stated in pursuance of this incidental power of the arbitrator to obtain an opinion of the Court for his guidance, there might be an appeal. I am of opinion that there is no appeal from the opinion of the Court upon such a case.

The other question as to costs is, no doubt, a little difficult and peculiar. When the Court ordered this special case to be stated, it did not impose any term as to costs, as it might have done. Upon the argument of the case stated, the Court ordered payment of costs by one of the parties. The question is whether the Court had jurisdiction to do so. By the schedule to the Arbitration Act, 1889, the costs of the reference and award are to be in the discretion of the arbitrator. I should have no doubt that, when an arbitrator for his own guidance asks for an opinion, the costs of obtaining such opinion would be costs of the reference and award in his discretion. It was argued that that perhaps might primâ facie be so,

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but that by the Judicature Act, 1890, there is a provision which gives the High Court power to determine all questions as to costs in any proceeding before it, and that this is such a proceeding. The answer is, that s. 5 is expressly made subject to any other express statutory provisions. Here there is such a provision, that the costs of a reference or award are to be determined by the arbitrator. I think, therefore, that these costs are excepted from the provisions of the Judicature Act, 1890, and are not to be determined at this stage by the High Court, but by the arbitrator. I am the more moved to that conclusion by the consideration that the arbitrator on the final determination of the whole matter will have better means of determining which party ought to pay these costs than the High Court, which has only before it the bare point of law raised by the special case. So I think that the Divisional Court exceeded their authority in determining who should pay these costs.

Appeal dismissed, except as to costs.

Solicitor for appellants: *J. R. Pakeman.*
Solicitors for respondent: *Hatchett-Jones & Co.*

E. L.

C. A. 1892 *June* 22.

[IN THE COURT OF APPEAL.]

CHARLES *v.* SHEPHERD.

Practice—Default of Defence—Motion for Judgment—Jurisdiction of Court to order Interlocutory Judgment—Order XXVII., *r.* 11.

Upon motion for judgment under Order XXVII., r. 11, upon default in delivery of defence, the Court or a judge may order interlocutory judgment to be entered, and may refer the whole claim to an official referee to ascertain and report to the Court the amount due to the plaintiff.

APPEAL of the plaintiff from an order of the Queen's Bench Division, upon motion for judgment, under Order XXVII., r. 11. (1)

(1) By Order XXVII., r. 11: "In all other actions than those in the preceding rules of this order mentioned, if the defendant makes default in delivering a defence, the plaintiff may set down the action on motion for judgment, and such judgment shall be given as upon the statement of claim the Court or a judge shall consider the plaintiff to be entitled to."

The statement of claim alleged that the plaintiff, a merchant in England, having business transactions on the West Coast of Africa, had appointed the defendant his agent for the collection of moneys due to him there, and for the purpose of such collection had delivered certain securities to the defendant; that the defendant had not collected certain of the debts, that he had not accounted for some of the debts collected, and that he had disposed of certain of the securities without collecting the debts. The plaintiff claimed an account, and payment by the defendant of 4462*l.* There was a further claim for a sum of 194*l.*, balance due from the defendant to the plaintiff for goods sold and delivered, and for money had and received.

The defendant entered an appearance to the writ, but made default in delivering his defence, and the plaintiff moved for judgment. The Court (Mathew and A. L. Smith, JJ.) refused to give final judgment upon either branch of the claim, and made an order referring the whole claim to an official referee to ascertain and report to the Court the amount due from the defendant to the plaintiff, with leave to the official referee to communicate with the defendant at Lagos. The plaintiff appealed.

Duke, for the plaintiff. There was no jurisdiction to send the whole claim to the official referee for inquiry and report, for the plaintiff is, at any rate, entitled to final judgment for the 194*l.* Under rule 2 of Order XXVII., if the claim is only for a liquidated demand, a plaintiff may enter final judgment if the defendant delivers no defence; under rule 6, if a claim for detention of goods or for damages be joined to the liquidated demand, he can enter final judgment for the liquidated demand and interlocutory judgment for the value of the goods or for the damages, and there seems to be no reason why he should not be entitled, under rule 11, to get final judgment for his liquidated demand because it happens to be joined to a claim for an account arising out of other matters.

LORD ESHER, M.R. We have consulted the members of the other division of the Court of Appeal upon the question of the

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construction to be placed upon Order XXVII., r. 11, and we are of opinion, upon the true construction of that rule—first, that the Court is not bound to give judgment for the plaintiff, even though the statement of claim may on the face of it look perfectly clear, if it should see any reason to doubt whether injustice may not be done by giving judgment; it has a discretion to refuse to make the order asked for; and secondly, that the expression, "such judgment as upon the statement of claim the Court or a judge shall consider the plaintiff to be entitled to," includes an interlocutory judgment, to be subsequently worked out, as well as a final judgment. Therefore, upon a motion for judgment under this rule, the Court may give a final judgment, or it may give a judgment which requires to be worked out, and which is in a sense interlocutory, such as a judgment for taking an account in equity. Where there is a judgment for an account, the account will be taken, and afterwards there will be another and final judgment for the amount found to be due. It is, we think, clearly in the power of the Court to give such a judgment under this rule. In the present case the claim is in substance for the balance of an account; and before that balance can be ascertained the two sides of that account, the debtor and creditor sides, must be set out. This action may, therefore, be treated as an action for an account, and the Court may properly say that it gives judgment for an account to be taken. That is in the strictest sense of the word a judgment; but it will have to be worked out, and when that is done final judgment will be given for the ascertained balance. The decision of the Divisional Court was therefore right, and the appeal must be dismissed.

BOWEN, L.J. I am of the same opinion. The proper construction of this rule has been put so clearly and effectively by the Master of the Rolls that I will not add one word which can qualify, alter, or modify what he has said. But I may point out that this rule is one of which the application is not limited to common law actions, nor to claims for liquidated demands or the detention of goods, but extends to a very large class of Chancery actions, and that it is therefore most necessary to place upon it such a construction as shall not limit its operation unduly. It

is necessary that we should hold that under it a judgment may be given which falls short of a final judgment, for in many classes of cases final judgment cannot be given at the outset, and the judgment given must be one that is interlocutory in its nature, and requires to be worked out. Above all I wish to protest that we are not bound to give a plaintiff final judgment because he shews a good claim on paper. The Court must have a discretion in the matter: at this stage the merits cannot be discussed, which is a reason for proceeding warily in order to avoid a chance of doing injustice.

KAY, L.J. I am of the same opinion, and should like to add a few words as to the application of this rule in the Chancery Division, as it applies to actions in that division as well as to those on the common law side. Nothing is more common in the Chancery Division than to give what is called an interlocutory judgment, which does not dispose of the whole case, but directs something to be done, such as the taking of an account. Commonly such a judgment is in one of two forms: either it directs that an account shall be taken, and that within a specified time after the chief clerk has given his certificate the amount found to be due shall be paid by the one party to the other (which combines an interlocutory and a final judgment in one form); or else it does not direct what is to be done when the account has been taken, but adjourns the further consideration of the action, in which case the parties have to come again to the Court to get a final order. Of the latter kind is the form of judgment in an action between a trustee and his cestui que trust; in the first instance, the judgment merely directs an account to be taken; when it has been taken, there comes the final order upon further consideration. If the construction of this rule is adopted which has been pressed upon us in this case, it would not apply to judgments of the kind I have just mentioned, and it would be impossible to work it in the Chancery Division; but I am clearly of opinion that it enables the Court to give a final judgment, when the case admits of it, or an interlocutory judgment, when that is more appropriate. It should not be overlooked that, in some of the rules of this Order, the expression

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"final judgment" is used; while, in the present rule, only the word "judgment" appears. It has been admitted that, in the present case, final judgment can only be given for the claim of 194*l.*; but, upon examination of the statement of claim, that sum appears to be claimed, not in respect of specific items, but as a balance due to the plaintiff, and I do not think he is entitled to final judgment in respect of it.

Appeal dismissed.

Solicitor for plaintiff: *Francis Miller.*

W. J. B.

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THE COUNTESS OF AYLESFORD *v.* THE GREAT WESTERN RAILWAY COMPANY.

County Court—Attachment of Debts—Discovery in aid of Execution—Examination of Married Woman—County Court Rules, 1892, *Order* XXV., *r.* 47.

Where a judgment or order has been obtained in a county court against a married woman for the recovery or payment of money, the judge has power to make an order for her examination as to her separate estate.

APPEAL from a decision of the judge of the Warwick County Court discharging an order obtained ex parte for the attendance of the plaintiff, a married woman, to be examined touching her separate estate.

The plaintiff had sued the defendants to recover damages for the loss of a dog, and upon the trial was nonsuited with costs; from this nonsuit there was no appeal. Execution having been issued by the defendants against the plaintiff for the amount of their costs, there was a return of no separate estate. The defendants, being desirous of testing the accuracy of the return, obtained an order ex parte from the learned county court judge, under Order XXV., r. 47 (1), of the County Court Rules, 1892, that

(1) By Order XXV., r. 47, of the County Court Rules, 1892: "When a judgment or order is for the recovery or payment of money, the party entitled to enforce it may apply to the judge or registrar for an order that the debtor liable under such judgment or order . . . . be orally examined as to whether any and what debts are owing to the debtor, and whether the debtor has any and what other property or means of satisfying the judgment or order . . . .; and the judge or registrar may make an order for the attendance and the examination of such debtor or of any other person, and for the production of any books or documents."

the plaintiff should attend upon a certain day and be examined touching her separate estate. Upon the day appointed for the examination she attended; but the objection was taken on her behalf that, being a married woman, she was not "a debtor liable under such judgment or order" within the meaning of the rule. The learned judge, upon the authority of *Scott* v. *Morley* (1), upheld the objection, and discharged the order. The defendants appealed.

Alfred Lyttelton, for the defendants. The order was properly made in the first instance, and ought not to have been discharged. The attention of the learned judge was not called to the case of *Holtby* v. *Hodgson* (2), where it was held that a judgment against a married woman may be made the foundation of a garnishee order; it is clear from the judgments in that case that a married woman may be a "debtor" for certain purposes. [He also cited *Pelton* v. *Harrison*. (3)]

Ernest Pollock, for the plaintiff. The decision in *Scott* v. *Morley* (1) has not been affected by the two cases cited. Discovery in aid of execution cannot be obtained against a married woman. In *Irwell* v. *Eden* (4), where under the corresponding rule of the Rules of the Supreme Court it was desired to examine the defendant's former manager, the defendant himself being out of the way, it was held that there was no power to make an order for the examination of any person other than the "debtor" liable under the judgment or order. A married woman is not a debtor, for the judgment is not a personal judgment against her, but a judgment against her separate estate only; again, if she were a debtor, she would be subject to bankruptcy proceedings, which she is not: *In re Gardiner, Ex parte Coulson*. (5)

WRIGHT, J. I am of opinion that this case comes exactly within the language and spirit of Order XXV., r. 47, of the County Court Rules, 1892. It is true that a married woman is not a debtor for all purposes and in all senses; but she is a debtor in

(1) 20 Q. B. D. 120.
(2) 24 Q. B. D. 103.
(3) [1892] 1 Q. B. 118.
(4) 18 Q. B. D. 588.
(5) 20 Q. B. D. 249.

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the sense that she is liable to the extent of her separate estate. The language of the judgment of the Master of the Rolls in *Holtby* v. *Hodgson* (1) is directly in point. The appeal must, therefore, be allowed.

BRUCE, J. I am of the same opinion.

Appeal allowed.

Solicitors for plaintiff: *Sharpe, Parker, Pritchard, & Sharpe, for Hughes & Masser, Coventry.*

Solicitor for defendants: *R. R. Nelson.*

W. J. B.

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[IN THE COURT OF APPEAL.]

IN RE HOWES. EX PARTE HUGHES.

Bankruptcy—Bankruptcy Notice—Irregularity—Obscurity—Notice set aside—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).

Upon an application to set aside a bankruptcy notice it appeared that the notice required the debtor to pay to "H. and others, trustees of the charity known as St. John's Hospital, Northampton, 250*l.*," the amount due upon a final judgment obtained by them against the debtor. The judgment upon which the notice was founded was headed, "H. and others, plaintiffs," and did not anywhere describe the plaintiffs as trustees:—

Held, that the bankruptcy notice was not in accordance with the terms of the judgment; that it was calculated to perplex the debtor; and that it ought to be set aside.

APPEAL against an order of a Divisional Court (Pollock, B., and Vaughan Williams, J.), affirming an order made by the Stafford County Court, setting aside a bankruptcy notice issued against Mark Howes.

On November 5, 1889, a writ was issued in an action in the Queen's Bench Division by the Rev. Nathaniel Thomas Hughes, and a number of other persons who were named in the writ as co-plaintiffs, against Elizabeth Howes and Mark Howes as defendants. The writ was indorsed with a claim by the plaintiffs, "as trustees of St. John's Hospital, in the town and county of Northampton," for damages against the defendants for breach of a covenant contained in a lease.

(1) 24 Q. B. D. 103.

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On December 5, 1889, the plaintiffs delivered a statement of claim, which stated that the lease was granted to John Howes, and that the defendants were his legal personal representatives.

On April 24, 1890, no defence having been delivered by the defendants, the plaintiffs obtained interlocutory judgment against the defendants for damages to be assessed. The interlocutory judgment was headed, "Between the Rev. Nathaniel Thomas Hughes and others, plaintiffs, and Elizabeth Howes and Mark Howes, defendants."

It was referred by the master to an official referee to assess the damages, and they were assessed at 166*l.* 11*s.* 4*d.*; and on August 4, 1891, the plaintiffs obtained final judgment, by which it was adjudged that "the plaintiffs recover against the defendants 166*l.* 11*s.* 4*d.*, and costs to be taxed." This judgment was headed in the same way as the interlocutory judgment, there being nothing in it to shew that the plaintiffs were trustees. The costs were subsequently taxed at 84*l.* 5*s.* 2*d.*

On January 22, 1892, the plaintiffs issued a bankruptcy notice against Mark Howes, which was duly served.

The notice required him within seven days after service "to pay to the Rev. Nathaniel Thomas Hughes and others (trustees of the charity known as St. John's Hospital, Northampton), of the Convalescent Home, Weston Favell, in the county of Northampton, the sum of 250*l.* 16*s.* 6*d.*, claimed by them as being the amount due on a final judgment obtained by them against you in the Queen's Bench Division of the High Court dated the 11th day of August, 1891, &c."

On the application of the debtor, the registrar of the county court set aside the bankruptcy notice, and the Divisional Court affirmed the decision.

The creditors appealed.

Muir Mackenzie, for the appellants. The bankruptcy notice does in substance follow, and is "in accordance with," the judgment. (1) At any rate the variance is an immaterial one.

(1) Sect. 4 of the Bankruptcy Act, 1883, provides "(1.) A debtor commits an act of bankruptcy in each of the following cases" (inter alia): "(*g.*) If a creditor has obtained a final judgment against him for any amount,

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The notice follows the Form No. 6 in the Appendix to the Bankruptcy Rules, 1886. It was said in the Divisional Court that the notice ought to state the names of all the plaintiffs and their addresses at the date of the notice, because only seven days are allowed for payment of the amount claimed, and the debtor ought to know where he is to go to pay it. But, by s. 143 of the Bankruptcy Act, 1883, no bankruptcy proceeding is to be invalidated by any formal defect or by any irregularity, unless the Court is of opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the Court. No substantial injustice has been caused here: *In re Bates.* (1) A sufficient address is given for the plaintiff Hughes.

Herbert Reed, for the debtor. The judgment ought to follow the writ. That was so at common law: *Jackson* v. *Litchfield.* (2) If there is a change in the parties to a judgment on either side, execution cannot issue upon it without the leave of the Court: Order XLII., r. 23. There is nothing to shew that the "others" referred to in the bankruptcy notice are the same persons as the judgment creditors. A bankruptcy notice may involve very serious consequences to the judgment debtor; any creditor may avail himself of the act of bankruptcy committed by non-compliance with the notice. How could the debtor in answer to such a notice as this shew that he had a counter-claim, set-off, or cross-demand? He could not shew that he had a counter-claim against Hughes and others in their individual capacity. On the face of the notice itself the debtor ought to be told the names of the creditors whom he is to pay,

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and execution thereon not having been stayed, has served on him in England, or, by leave of the Court, elsewhere, a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not, within seven days after service of the notice, in case the service is effected in England, either comply with the requirements of the notice, or satisfy the Court that he has a counter-claim set-off or cross demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained."

(1) 4 Morrell, 192.

(2) 8 Q. B. D. 474.

or against whom he is to satisfy the Court that he has a counter-claim, &c. He might have a perfectly good counter-claim against the persons named in the writ and in the judgment, but none against the trustees of St. John's Hospital. The Court has always held that procedure which is to lead up to an act of bankruptcy must be strictly followed.

Muir Mackenzie, in reply.

[LORD ESHER, M.R. Have you not changed the character of the plaintiffs by calling them in the bankruptcy notice trustees of the charity?]

Those words are only inserted in brackets; the debtor is still required to pay "Hughes and others." He is required to pay the debtor "in accordance with the terms of the judgment"—that is, to the plaintiff Hughes at the address given. The judgment is one on which a fi. fa. could legally issue, otherwise the sheriff would be liable to an action for trespass. The debtor should have applied to have the judgment set aside. A bankruptcy notice is equivalent to a writ of fi. fa. The plaintiffs must have obtained judgment as lessors, not as trustees.

LORD ESHER, M.R. In my opinion this appeal ought to be dismissed. It is said that the bankruptcy notice follows the terms of the judgment. In my opinion it does not, in the sense in which it ought to follow them. It has made an addition to the judgment which, although it may in law be mere surplusage, is well calculated to perplex the judgment debtor. The judgment was recovered by "the Rev. Nathaniel Thomas Hughes and others"; the bankruptcy notice requires the debtor to pay "to the Rev. Nathaniel Thomas Hughes and others (trustees of the charity known as St. John's Hospital, Northampton)." This, as it seems to me, so far alters the character of the creditors as described in the judgment as to be extremely likely to perplex the judgment debtor. The bankruptcy notice is not, therefore, "in accordance with the terms of the judgment." This is a sufficient reason for setting the notice aside. But I go further. In my opinion, if a creditor in obtaining a judgment against his debtor for default of appearance chooses to accept it

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expressed in such terms as this, "A. B. and others" (he is not compelled to accept it so expressed), and then issues a bankruptcy notice in similar terms, it is so likely to perplex the debtor and so unfair that the Court of Bankruptcy, which has regard to equitable considerations, ought not to enforce it.

BOWEN, L.J. I am of the same opinion. The bankruptcy notice does not follow the terms of the judgment. The addition of the words, "trustees of the charity known as St. John's Hospital, Northampton," is either one of which we must take cognisance as material, or one which we must reject as immaterial. If we treat it as material, the bankruptcy notice varies from the judgment. Reading the judgment in the way most favourable to the plaintiffs, we must assume that "Hughes and others" were formerly the trustees of the charity; and if so, it does not necessarily follow that the addition was a description of the same persons as those who brought the action. If, on the other hand, the addition is to be regarded as immaterial, the question is, whether the bankruptcy notice ought to be allowed to stand as a notice requiring the debtor to pay "Hughes and others." A bankruptcy notice ought to inform the debtor clearly who is the creditor whom he is required to pay. In the present case the judgment gives the debtor no such information, and the bankruptcy notice does not supply the defect. Such a notice would be extremely hard and oppressive. I do not regard this as a merely technical matter, for bankruptcy proceedings are of a peculiar character. They involve quasi-penal consequences to the debtor, and it is essential that all those forms, the object of which is to prevent injustice, should be strictly followed. Such a notice as this would be simply a trap for the debtor.

A. L. SMITH, L.J. I am of the same opinion. The judgment shews that "Hughes and others" have a claim in their personal capacity against the debtor. The bankruptcy notice seems to shew that "Hughes and others" have a claim against the debtor in a representative capacity "as trustees," and the debtor may well have so understood it. In these circumstances the bankruptcy notice is not, in my opinion, in accordance with the terms

of the judgment. I agree with what has been said by my brethren; and I think that the bankruptcy notice is bad.

Appeal dismissed.

Solicitors: *Phipps & Watkins; A. C. Doyle.*

W. L. C.

[IN THE COURT OF APPEAL.]

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IN RE FRASER. EX PARTE CENTRAL BANK OF LONDON.

Bankruptcy—Receiving Order—Judgment Debt—Power of Court to go behind Judgment—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*), *s.* 7—*Partnership—"Holding out" as partner—Liability of retiring Partner for Debts of Firm contracted after Dissolution of Partnership.*

Upon the hearing of a creditor's petition for a receiving order against a judgment debtor, the Court of Bankruptcy has power, at the instance of the debtor himself, to go behind the judgment and to inquire into the validity of the debt, even though the debtor has previously applied in the action to set aside the judgment, and his application has been refused, and the refusal affirmed by the Court of Appeal.

A partnership having been dissolved by mutual consent, and proper notices of the dissolution given, the mere fact that the retiring partner allows the continuing partner to carry on business in the old firm name is not such a "holding out" of the former as a partner as will render him liable for a debt of the firm contracted after the dissolution with a person who had not dealt with the old firm, and who had no knowledge of the dissolution.

APPEAL from the refusal to make a receiving order against John Fraser.

The bankruptcy petition was presented by the Central Bank of London, who were the holders for value of a bill of exchange for 500*l.*, due December 5, 1890, which was accepted in the name of a partnership firm of W. & J. Fraser. The bank had discounted the bill on November 20, 1890. The firm had consisted of John Fraser and his brother William Fraser. On December 6, 1890, the bank issued a specially indorsed writ in an action in the Queen's Bench Division against W. & J. Fraser upon the bill, which had been dishonoured. On December 16 an appearance to the writ was entered for "William Fraser and John Fraser, sued as W. & J. Fraser, carrying on business as W. & J. Fraser." On the application of the bank, an order was, on December 23, made by the

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master, giving them leave to sign judgment under Order XIV. for the amount indorsed on the writ, with interest and costs. The defendants did not appear on the hearing of the summons. On December 24, judgment was signed for 501*l.* 6*s.*, and costs. The judgment debt was not paid. On March 16, 1892, John Fraser issued a summons in the action, asking that the judgment might be set aside as against him, on the ground that, prior to the date of the acceptance of the bill, the partnership between himself and his brother had been dissolved, the business being afterwards carried on by William Fraser alone, so that John Fraser was not liable upon the bill. The master dismissed the summons. John Fraser appealed to the judge in chambers. The judge referred the matter back to the master for further inquiry. The master, after hearing further evidence, adhered to his former decision, and the judge then dismissed the appeal. John Fraser appealed to the Divisional Court, and the appeal was dismissed. He then appealed to the Court of Appeal (Fry and Lopes, L.JJ.), who, on May 30, 1892, dismissed the appeal on the ground of delay, and also because they were not satisfied by the evidence that the partnership had been dissolved before the date of the acceptance, or that, if it had, the money was not raised for the purpose of discharging partnership liabilities.

On March 9, 1892, the bank had served a bankruptcy notice on John Fraser in respect of the judgment debt. An act of bankruptcy was committed by non-compliance with the notice, and the bank presented a bankruptcy petition. John Fraser resisted the making of a receiving order on the ground that at the date of the acceptance he was not a partner in the firm of the acceptors. Upon the evidence adduced to him the registrar came to the conclusion that this was the fact, and he, therefore, refused to make a receiving order, and dismissed the petition.

The bank appealed.

Hopkinson, Q.C., and *Vivian Morten*, for the bank. Though the Court of Bankruptcy does in some cases go behind a judgment for a debt, and inquire into the consideration for the debt, it ought not to do so in a case in which the debtor has, on the very same grounds which he now puts forward, endeavoured to set

aside the judgment, and his application has been refused by every Court, including the Court of Appeal. The validity of the debt cannot now be disputed by the debtor, even in the Court of Bankruptcy. The matter is really *res judicata: Bowes* v. *The Hope Life Insurance Company.* (1)

[KAY, L.J., referred to *Ex parte Banner.* (2)

LORD ESHER, M.R., referred to *Ex parte Lennox.* (3)]

In that case the debtor had not taken any steps to set aside the judgment. Here he has done so without success.

Even if John Fraser was not a member of the firm at the time of the acceptance, he had held himself out as a partner by allowing his brother to carry on business under the name of the old firm. It is not necessary for the purpose of making him liable on this ground that the representation should have been made to the particular person who seeks to take advantage of it; it is sufficient if the representation comes to the knowledge of any such person casually.

F. H. Mellor, for John Fraser, was not heard.

LORD ESHER, M.R. This appeal must be dismissed. A judgment was obtained by the appellants against the alleged debtor. The judgment was against a partnership firm, and against him as one of the partners. The judgment had been obtained under Order XIV., and an application had been made by John Fraser to the Queen's Bench Division to set aside the judgment as against him, and to allow him, notwithstanding the judgment, to defend the action. This was a matter for the discretion of the Court, and in the exercise of that discretion the master, the judge in chambers, the Divisional Court, and ultimately the Court of Appeal, refused the application. They did so on the ground of delay, and on some other grounds. As a matter of law the judgment, therefore, stands as a good judgment against John Fraser, and it cannot be questioned by him in any Court, except the Court of Bankruptcy. But, when it is sought to obtain a receiving order against him in respect of the judgment debt, the Court of Bankruptcy has to exercise its discretion, and for the

(1) 11 H. L. C. 389. (2) 17 Ch. D. 480.
(3) 16 Q. B. D. 315.

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exercise of that discretion one rule of conduct is to be found in s. 7 of the Bankruptcy Act, 1883, which provides, by sub-s. 3, that, "if the Court is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the Court may dismiss the petition." The question is, whether the registrar had not a discretion under s. 7, and whether he has rightly exercised that discretion. The mere fact that there is a judgment for the debt does not prevent the registrar from saying that there is no good petitioning creditor's debt. The Court of Bankruptcy can go behind the judgment, and can inquire whether, notwithstanding the judgment, there was a good debt. In so doing, the Court of Bankruptcy does not set aside the judgment. If I may use the expression, the Court goes round the judgment, and inquires into the subject-matter. Upon the words of s. 4 of the Bankruptcy Act alone it might be said that the existence of a judgment determined the matter; but s. 7 shews that the Court of Bankruptcy, though the judgment cannot be set aside, may inquire, even at the instance of the debtor, whether there is any ground for making a receiving order. That this is so was determined by this Court in *Ex parte Lennox* (1), which shews that, though there is a judgment, which the judgment debtor cannot set aside, he may nevertheless ask the Court of Bankruptcy to inquire whether the debt on which the judgment was founded was a good debt, and that, if the Court is satisfied that it was not, it may refuse to make a receiving order in respect of the debt. The decision is based upon the highest ground—viz., that in making a receiving order, the Court is not dealing simply between the petitioning creditor and the debtor, but it is interfering with the rights of his other creditors, who, if the order is made, will not be able to sue the debtor for their debts, and that the Court ought not to exercise this extraordinary power unless it is satisfied that there is a good debt due to the petitioning creditor. The existence of the judgment is no doubt primâ facie evidence of a debt; but still the Court of Bankruptcy is entitled to

(1) 16 Q. B. D. 315.

inquire whether there really is a debt due to the petitioning creditor. The question is, whether the registrar has in the present case rightly exercised this power—whether, in fact, there is a good petitioning creditor's debt. The facts of the case had to be dealt with by the registrar. He was entitled to hold that the partnership had been dissolved before the acceptance was signed, and, if so, the fact was proved that the acceptance was not John Fraser's acceptance.

But it is said that John Fraser is liable on the bill because he held himself out as a partner in the firm. The doctrine of "holding out" is a branch of the doctrine of estoppel. If a man holds himself out as a partner in a firm, and thereby induces another person to act upon that representation, he is estopped as regards that person from saying that he is not a partner. The representation may be made either by acts or by words; but the estoppel can be relied upon only by the person to whom the representation has been made in either way, and who has acted upon the faith of it. There is no evidence in the present case of any such holding out by John Fraser to the petitioning creditors. If they had dealt with the old firm, and had had no notice of the dissolution of partnership, the case would be entirely different.

Then it is said that the question of the validity of the debt is already res judicata by the refusal of this Court to set aside the judgment. But that decision was an adjudication upon the question whether the judgment could be set aside at the instance of the judgment debtor himself; the present question is whether, the judgment standing as a good judgment, the debt can in the Court of Bankruptcy constitute a good petitioning creditor's debt. In my opinion it cannot.

BOWEN, L.J. I am of the same opinion.

KAY, L.J. I agree. It is old law in bankruptcy that, neither upon an attempt to prove a debt, nor upon a petition for an adjudication of bankruptcy or a receiving order against a debtor, is a judgment against him for the debt conclusive. In *Ex parte Bryant* (1), Lord Eldon said: "Proof upon a judgment will not

(1) 1 V. & B. at p. 214.

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stand merely upon that, if there is not a debt due in '*truth and reality*,' for which the consideration must be looked to." Can this judgment be treated as conclusive in bankruptcy because the debtor has unsuccessfully attempted to set it aside? I think not, and I cannot see how the matter is any more res judicata because there has been an unsuccessful appeal to this Court. I agree in all that the Master of the Rolls has said on this point.

As regards the question of "holding out," I think it is clearly proved that at the time when the acceptance was given John Fraser was not a partner in the firm. He had been a partner, but the partnership had been dissolved, and the business was, with the consent of John Fraser, being carried on by William Fraser under the old firm name. The bank, who claim to be creditors of John Fraser in respect of the acceptance, had had no dealings with the old firm. Does the fact that John Fraser permitted his brother to carry on the business under the old firm name amount to a representation by him to the bank that he, John Fraser, was a partner in the firm? I think that *Newsome* v. *Coles* (1) shews that it does not. In that case Thomas Coles and his three sons, William, George, and Charles, had carried on business in partnership under the firm of "Thos. Coles & Sons." The father died in 1805, and the three sons continued to carry on business under the same firm till the year 1808. George and Charles then withdrew, and established a new business under a new firm. Notice of the dissolution of partnership was published in the *London Gazette*, and was sent round to the correspondents of the house. William Coles continued the old business by himself, under the old firm, and in March, 1810, he accepted in that name a bill of exchange drawn upon Thomas Coles & Sons. The plaintiff, the holder of the bill, had not had any dealings with the partnership of Thomas Coles & Sons when composed of the three brothers, and when he took the bill he did not know that that partnership had been dissolved. He sued the three brothers upon the acceptance, and it was held by Lord Ellenborough that the brothers George and Charles were not liable. They had done all that they could to notify the dissolution of the old partnership. In the present case the evidence shews

(1) 2 Camp. 617.

that, when the dissolution of partnership took place, the partners notified it to their bankers and to their principal creditors. The appellants say that before they discounted the bill they inquired of those bankers who were the partners in the firm of W. & J. Fraser, and that the manager told them John Fraser was a partner. But the manager was not called, and there is really no evidence of such a statement. I think the facts bring the case within the principle of *Newsome* v. *Coles* (1), and that there is no estoppel as against John Fraser. In my opinion the registrar's decision was right.

Appeal dismissed.

Solicitors: *Morten, Cutler & Co.; Williams & Neville.*

W. L. C.

[IN THE COURT OF APPEAL.]

REDDAWAY *v.* BENTHAM HEMP-SPINNING COMPANY.

Trade-mark—Unregistered Trade-mark—Infringement—Intention to Deceive—Evidence.

The plaintiffs had for many years made and sold belting for machinery, which they called "Reddaway's Camel-hair Belting," but had not registered any trade-mark. The defendants made and sold similar belting which they called "The Bentham Camel-hair Belting." An action having been brought by the plaintiffs to restrain the defendants from infringing their trade-mark and for damages, the plaintiffs gave evidence that their belting, and no other belting, was known to the trade as "camel-hair belting"; but they offered no evidence to prove that the defendants had ever sold their belting as the plaintiffs' belting, or that any person had bought the defendants' belting upon the supposition that it was made by the plaintiffs. The judge, at the trial, stopped the case without hearing evidence for the defendants, and the jury, by his direction, gave a verdict for the defendants:—

Held, by Lindley, and Lopes, L.JJ. (A. L. Smith, L.J., dissenting), that there must be a new trial, in which it should be left to the jury, (1.) whether the words "camel-hair belting" had acquired in the trade the meaning of belting made by the plaintiffs; and, if so, (2.) whether the defendants' description of their belting was likely to deceive purchasers and to induce them to suppose that their belting was made by the plaintiffs; in which case the plaintiffs would be entitled to an injunction without proof of an intention to deceive:

By A. L. Smith, L.J., dissenting, that there was no evidence for the jury that the defendants had sold or attempted to sell their belting under circumstances likely to deceive purchasers; and that a verdict was properly directed for the defendants.

THIS was an application by the plaintiffs for a new trial, or to have the judgment entered for them.

(1) 2 Camp. 617.

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REDDAWAY v. BENTHAM HEMP-SPINNING COMPANY.

At the trial, before Cave, J., at Manchester, it appeared that the plaintiffs were manufacturers of a particular kind of belting for machinery, which was known by the name of "Reddaway's Camel-hair Belting." The plaintiffs had no registered trade-mark for their belting, but had sold it under the above-mentioned name for more than twelve years. In 1890, the defendants, who had previously sold belting under the name of "The Bentham Solid Woven Hair Belting," began to sell belting which they called "The Bentham Camel-hair Belting," and it was so described in their trade circulars.

The plaintiffs brought the present action for an injunction and damages, claiming the right to use the words "camel hair" as a common law trade-mark.

The evidence shewed that what was called camel-hair belting was not made entirely of camel's hair, but of a material called in the trade "camel tops," composed of cotton, goat's hair, and sheep's wool, with a small quantity of camel's hair added. The plaintiffs gave evidence to the effect that the belting made by them was very widely known as "camel-hair belting," and that those words were not used by any other manufacturers until they were adopted by the defendants; but they failed to shew that the defendants had sold their belting as the plaintiffs' belting, or that any persons had actually bought the defendants' belting upon the supposition that it was made by the plaintiffs.

At the end of the plaintiffs' case, the judge asked the defendants' counsel whether he would have the case laid before the jury or rely on the judge's ruling, and, the counsel accepting the latter alternative, the learned judge directed the jury to find a verdict for the defendants; holding that the plaintiffs could not succeed unless they shewed that some one had been in fact deceived.

The plaintiffs now moved for a new trial or for judgment.

Jelf, Q.C., and *J. C. Graham*, for the plaintiffs. The case ought to have been laid before the jury. The plaintiffs had given sufficient evidence to sustain their action. They had shewn that the words "camel-hair belting" did not apply to a particular kind of belting which any one might make, but only to the belting made by the plaintiffs. All the "camel-hair belting"

made in the trade was made by the plaintiffs, and the use of these words has never become publici juris. Therefore it is not necessary for the plaintiffs to offer evidence that buyers of the defendants' belting had been actually deceived and had supposed that they were purchasing the plaintiffs' belting. The onus is on the defendants to shew that they have taken sufficient precaution to prevent the public from being misled. The law is the same of a common law trade-mark like the present as of a registered trade-mark, that if the plaintiffs' right is violated damage is presumed: *Rodgers* v. *Nowill* (1); *Johnston* v. *Orr Ewing* (2); *Millington* v. *Fox* (3); *Blofeld* v. *Payne.* (4)

Smyly, Q.C., and *Whately*, (*Sutton*, with them), for the defendants. The words "camel-hair belting" are well known in the trade as belting made of a mixed material of which camel's hair forms part, and have become publici juris. The plaintiffs have therefore no cause of action unless they can shew that the defendants have deceived, or intended to deceive, the public by selling their goods as if they were made by the plaintiffs. This they have never done, but have always sold their belting as "Bentham Camel-hair Belting." This is not like the cases in which the plaintiff has established a right of property in a fancy word, as in the *Glenfield Starch Case.* (5) "Camel-hair" was not a fancy name, but a description of the article, and the plaintiffs cannot succeed without proving special damage or a fraudulent intention. The learned judge was therefore right in directing a verdict for the defendants: *Linoleum Manufacturing Co.* v. *Nairn* (6); *United Telephone Co.* v. *London and Globe Telephone Co.* (7)

Jelf, Q.C., in reply.

Cur. adv. vult.

1892. July 25. LINDLEY, L.J. This was an action brought by the plaintiffs against the defendants for infringing what may be called a common law trade-mark of the plaintiffs. It is not a

(1) 5 C. B. 109.

(2) 13 Ch. D. 434; 7 App. Cas. 219.

(3) 3 My. & Cr. 338.

(4) 4 B. & Ad. 410.

(5) *Wotherspoon* v. *Currie*, Law Rep. 5 H. L. 508.

(6) 7 Ch. D. 834.

(7) 26 Ch. D. 766.

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registered trade-mark. But the plaintiffs' case was that they were the makers and sellers, and had been for some years, of a particular kind of belting known as "Reddaway's Camel-hair Belting," and the defendants, intending of course to get the benefit of the reputation of the plaintiffs, have lately made and sold belting which they described in their trade circulars as "The Bentham Camel-hair Belting," and the object was to obtain an injunction and damages. The case came before Cave, J., and the plaintiffs adduced a considerable amount of evidence to the effect that this belting made by them was known in the trade as "camel-hair belting," and that "camel-hair belting" in the trade was theirs and nobody else's. There was evidence that there was a material called "camel tops" known in the trade, and that is what this belting of the plaintiffs was made from. At the end of the plaintiffs' case, Mr. Bigham, who was for the plaintiffs, stated this (I am reading from the learned judge's notes): "Mr. Bigham admits that he has no other evidence except of a similar character, and that he cannot prove that the defendants have ever sold their camel-hair belting as the plaintiffs' camel-hair belting, or that any person has bought any camel-hair belting of the defendants under the supposition that they were buying the plaintiffs' camel-hair belting." There is no controversy as to what the defendants have done. They have sold belting, not with any trade-mark of the plaintiffs' upon it, nor, so far as we know, with any trade-mark actually upon it; but they have sold under circulars and price lists which describe this belting as "Bentham's"—not as "Reddaway's," nor as "camel-hair belting" alone—but they have made sales under these circulars and trade lists. Further than that, there was evidence that the defendants had progressed somewhat in their circulars and trade lists, and that "camel-hair belting" simply was the last description of it in their circulars and lists. Under these circumstances, Cave, J., asked Mr. Gully, who was for the defendants, if he would go to the jury or rely on the learned judge's ruling. Mr. Gully said he would rely on the judge's ruling; and then the judge directed a verdict for the defendants —that is to say, the case never went to the jury at all. From that the plaintiffs appeal on the grounds urged before us by

their counsel, who contend very strongly that there was at all events a case to go to the jury, and I have come to the conclusion that they are right.

The first question is, What does "camel-hair belting" denote? If it denotes belting made only by the plaintiffs, the defendants have no right to sell their belting by the same name unless they take sufficient precaution to prevent buyers from being misled. But if the expression "camel-hair belting" denotes a particular kind of belting which any one may make, then any one who makes that kind of belting may call it by the name by which it is known in the trade. In the case now supposed the name will have become publici juris, although it may originally not have been so. This is pointed out in *Singer Manufacturing Co.* v. *Loog* (1), and the test for determining whether a word which was once a trade-mark has become publici juris is given by Mellish, L.J., in *Ford* v. *Foster* (2):—

"I think the test must be, whether the use of it by other persons is still calculated to deceive the public, whether it may still have the effect of inducing the public to buy goods not made by the original owner of the trade-mark as if they were his goods. If the mark has come to be so public and in such universal use that nobody can be deceived by the use of it, and can be induced from the use of it to believe that he is buying the goods of the original trader, it appears to me, however hard to some extent it may appear on the trader, yet practically, as the right to a trade-mark is simply a right to prevent the trader from being cheated by other person's goods being sold as his goods through the fraudulent use of the trade-mark, the right to the trade-mark must be gone."

The evidence shews that the belting made and sold by the plaintiffs as "Reddaway's Camel-hair Belting" is known in the trade as "camel-hair belting," and the word "Reddaway's" is often dropped in business. The evidence also shews that all belting known as "camel-hair belting" is of the plaintiffs' manufacture. The evidence as it stands falls short in my opinion of shewing that "camel-hair belting" denotes a kind of belting well known in the trade without reference to any particular

(1) 8 App. Cas. 15, 27. (2) Law Rep. 7 Ch. 611, at p. 628.

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maker. But this I think should be left to the jury. My own view is that primâ facie the camel-hair belting made by the defendants is likely to be mistaken for that made by the plaintiffs, and if this be so, the defendants have no right to call their belting "camel-hair belting" unless they take sufficient care to prevent mistakes. It is true that the defendants call their belting "Bentham's," and that the plaintiffs call theirs "Reddaway's." But in commerce these words are soon dropped—ordinary purchasers do not know of them; and if it be true that "camel-hair belting" denotes belting made by the plaintiffs, then belting made by the defendants will soon be known by the same short name, and may then be easily mistaken for the belting made by the plaintiffs. Cave, J., gave judgment for the defendants on the ground that the plaintiffs had not proved any instance in which a purchaser had been misled. If this action had been an action for damages only, Cave, J., would perhaps have been right. If there had been proof of an intent by the defendants to deceive and of a sale with that intent, deception in fact would be inferred, and the plaintiffs would have been entitled to judgment even at law although only for nominal damages: see *Rodgers* v. *Nowill.* (1) Looking at the defendants' circulars, I think there was evidence to go to the jury of intent to deceive; but the evidence was slight, and I should not think a new trial ought to be granted on this ground if there were nothing else. But I am convinced that the learned judge had not present to his mind the equitable doctrine established by Lord Cottenham in *Millington* v. *Fox* (2), and recognised and acted on by the House of Lords in *Johnston* v. *Orr Ewing.* (3) To obtain an injunction in a case like the present it is not necessary to prove an intention to mislead; nor to prove that any one has in fact been misled; all that need be proved is that the defendants' goods are so marked, made up, or described by them as to be calculated to mislead ordinary purchasers and to lead them to mistake the defendants' goods for the goods of the plaintiffs. The fact that no proof can be given that any one has been misled will be some evidence to shew that no one is likely to be misled. But the

(1) 5 C. B. 109. (2) 3 My. & Cr. 338.
(3) 7 App. Cas. 219.

absence of such proof is by no means conclusive; much must depend on the time the defendants have been carrying on their business in the way complained of. I cannot say that there was no evidence on which a jury could properly find against the defendants on this question of likelihood to mislead, if such a question had been left to them. The catch-words are "camel-hair belting," and, as in the *Glenfield Starch Case* (1) so in this, the use of the catch-words alone may establish the plaintiffs' right to relief. The plaintiffs have no right to the exclusive use of those words; but they have a right to restrain any one from so using them as to pass his goods off as the goods of the plaintiffs. There ought, in my opinion, to be a new trial, and two questions at least should be left to the jury, viz.:—

1. What does camel-hair belting mean? Does it mean belting made by the plaintiffs as distinguished from belting made by other manufacturers, or does it mean belting of a particular kind without reference to any particular maker?

2. If it has the first of these meanings, then the next question will be, Do the defendants so describe their belting as to be likely to mislead purchasers, and to lead them to buy the defendants' belting as and for the belting of the plaintiffs?

The second question, if answered in the affirmative, would entitle the plaintiffs to an injunction without proof of any intent to deceive.

LOPES, L.J. The learned judge, thinking there was no evidence adduced by the plaintiffs upon which the jury could reasonably act, withdrew the case from them and nonsuited the plaintiffs. The question which we have to consider is, whether there was any evidence which ought to have been left to the jury. This Court in determining this question will not be bound by any statement or admission of counsel at the trial at Nisi Prius, but will look for themselves at the whole evidence adduced by the plaintiffs, and then decide whether upon a right holding there was any evidence which ought to have been submitted to the jury. It appears to me that the learned judge attached too much weight to the fact that no actual deception and no special

(1) *Wotherspoon* v. *Currie*, Law Rep. 5 H. L. 508.

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damage was proved, and also overlooked the equitable doctrine which permits the granting of an injunction where no deceit nor fraudulent intention is established. The law applicable to this case may be stated as follows:—If a person sells his goods with the intention of deceiving purchasers and of inducing them to believe that his goods are the goods of another, this is actionable, and entitles the latter to recover nominal damages even though no special damage is proved. If an article has acquired a distinctive meaning in the trade connecting it with a particular person's manufacture, and another so advertises or describes or makes up his goods as to lead purchasers to believe, or to create a probability of their believing, that they are buying the goods of the former, when in fact they are buying the goods of the latter (and this though there is no intention to deceive and no special damage proved), a Court of Equity will grant relief by way of injunction.

The fraudulent intention is essential in the first case; it is unnecessary in the second. Now, what was the evidence in this case given by the plaintiffs? There was evidence that the plaintiffs ever since 1879 had been manufacturing an article which they called "camel-hair belting," about which they had expended very large sums of money and for which they had acquired a world-wide reputation, and that the term "camel-hair belting" had acquired a distinctive meaning in the trade, connecting it with the plaintiffs' name; that it was not known in the trade with reference to any other makers but themselves; that though the plaintiffs called their belting "Reddaway's Camel-hair Belting," it was bought, sold, and known as "camel-hair belting"; that no other belting was known in the trade as "camel-hair belting" except the plaintiffs', and that any one wanting it would ask for "camel-hair belting," dropping the prefix of Reddaway's. There was also evidence that nobody down to 1890 had called his belting "camel-hair belting;" that the plaintiffs' belting contained little (if any) camel's hair, and was chiefly composed of the hair of goats and sheep, the name of "camel-hair belting" being given to it as a distinctive name; that in 1890 the defendants first called their belting "camel-hair"; that before 1890 they made a belting which they called the "Bentham

Solid Woven Hair Belting," but that in 1890 they issued circulars calling their manufacture the "Bentham (Solid Woven) Camel-hair Belting," and issued circulars advertising and selling it under that description. There was no more camel's hair in the defendants' than in the plaintiffs' belting. It is true they called it "The Bentham"; but there was evidence to shew that this prefix would be dropped in the trade and the article would be called and known as "camel-hair belting," so that both the plaintiffs' and the defendants' manufacture would become known in the trade as "camel-hair belting."

In these circumstances, I am unable to say that there was no evidence that ought to have been left to the jury that the defendants passed their goods off with the intention of deceiving purchasers, and of inducing them to believe that their goods were the goods of the plaintiffs. I am unable to say that there was not evidence of a fraudulent intention. Why did the defendants in 1890 call their belting "camel-hair belting"? This description had become for years past the description by which the plaintiffs sold their belting—the description by which it was known, and under which it had acquired its great reputation. The defendants might have called their belting "goat-hair belting," "sheep-hair belting," "buffalo-hair belting," or many other names that could easily be suggested. They call their belting, however, "camel-hair belting." Surely the assumption of this description required explanation, and was evidence of a fraudulent intention about which the opinion of the jury ought to have been taken. But still less am I able to say that there was not evidence that ought to have been left to a jury with regard to the relief sought to be obtained by way of injunction. To obtain this relief it was not necessary to prove any fraudulent intention; it was sufficient for the plaintiffs to prove that the term "camel-hair belting" denoted a kind of belting well known in the trade with reference to his particular manufacture, and that the defendants had so advertised and described their belting as to lead purchasers to believe, or to make it probable they would believe, that the defendants' belting was the plaintiffs'. Without recapitulating the evidence, beyond all question to my mind there was evidence adduced by the

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plaintiffs which unexplained would justify the jury in finding a verdict in this respect for the plaintiffs. The defendants had no right to call their belting "camel-hair belting" unless they took adequate precaution to prevent its being taken for the plaintiffs'. Whether the prefix of "The Bentham," or whether anything else they did, was sufficient for this purpose, would be a question for the jury. After a careful consideration of this case, I come to the conclusion that the learned judge was wrong in nonsuiting the plaintiffs and that there must be a new trial.

A. L. SMITH, L.J. The plaintiffs seek to recover damages, laid at 5000*l.*, and an injunction against the defendants, their cause of action being at common law, and not founded upon any statute. The plaintiffs were nonsuited by my brother Cave. It appears to me that the plaintiffs had a cause of action which should have been left to the jury if they gave evidence that the defendants had passed or attempted to pass off their goods as being the goods of the plaintiffs' manufacture in a way calculated to lead purchasers to believe that the defendants' goods were those of the plaintiffs' make. If the plaintiffs gave evidence that the defendants had passed off their goods with this intention, under circumstances calculated to mislead purchasers, then they had a cause of action for damages, even though they proved no special damage: *Blofeld* v. *Payne* (1) and *Rodgers* v. *Nowill.* (2) If they gave no evidence of intention, but only of the passing off or the attempting to pass off the defendants' goods under circumstances calculated to mislead purchasers, then they had a cause of action against the defendants entitling them to an injunction: *Millington* v. *Fox* (3); *Johnston* v. *Orr Ewing.* (4)

The points, therefore, are, first—Was there evidence to go to the jury of the defendants passing or attempting to pass off their goods as the goods of the plaintiffs, whether intentionally or not? And, secondly, Was what they did calculated to lead purchasers to believe that the defendants' goods were those of the plaintiffs' manufacture? The plaintiffs, in my judgment, must give evidence upon both points to succeed.

(1) 4 B. & Ad. 410.
(2) 5 C. B. 109.
(3) 3 My. & Cr. 338.
(4) 7 App. Cas. 219.

In considering the first point, it must be borne in mind that evidence was given by the plaintiffs to shew that, at the date of the defendants' circular, "camel-hair belting" was not the name of an article generally known in commerce, and that the name then denoted that it was an article produced by the plaintiffs alone, or, to use the words of Lord Selborne in *In re Leonard & Ellis's Trade-mark* (1), that the article was not publici juris. The question arises, For what purposes did the defendants adopt this name, "camel-hair belting"? The belting they made was not made of camel's hair per se. It may be that the defendants have a perfect explanation; but until given, in my judgment, a jury would be entitled to find (if they thought that the words, used in the way they were proved to have been used by the defendants, were calculated to mislead purchasers) that the name was used by the defendants for the purpose of attempting to appropriate what they could of the plaintiffs' trade; and if this be so, there was evidence upon the first head which should have been left to the jury.

The next point is, Was there evidence that those words were used under circumstances likely to deceive purchasers? It is clear, upon reading the shorthand notes of the trial, that the plaintiffs rested their case exclusively upon the circulars and price-lists issued by the defendants. These were put in by the witness Rowbottom. The plaintiffs then called a body of evidence to shew that "camel-hair belting" was known in the trade as "Reddaway's." They gave no evidence that the circulars or price-lists were calculated to mislead purchasers; but, on the contrary, two of their witnesses upon cross-examination—viz., Sorabjee and Trotman—stated that they were not. It was not suggested that these documents were dressed up so as to deceive. The circulars began, "Bentham, near Lancaster"—they called the article the "Bentham Solid Woven Camel-hair Belting"—and finished, "Yours truly, Bentham Hemp-Spinning Company, Limited. E. Gregson, Director." The price-lists were those of "The Bentham Hemp-Spinning Company, Limited," and gave the price of "The Bentham Solid Woven Camel-hair Belting." The plaintiffs, although they had called ten witnesses, had given

(1) 26 Ch. D. 296.

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no evidence of the defendants having in fact sold or attempted to sell any "camel-hair belting" under circumstances likely to deceive purchasers, excepting as might appear in the circulars and price-lists; and it was in these circumstances that my brother Cave intervened and said, "We are a long while in preliminaries; when shall we come to the point?" the foreman of the jury stating, "We think we have had sufficient of this class of evidence." Therefore a discussion arose as to whether the plaintiffs could give evidence that what the defendants had done, and which was complained of, was likely to deceive purchasers, my brother Cave stating, "You have not yet shewn that they sold 'camel-hair belting' alone. Your witnesses have said that if it was offered to them as 'Bentham's Camel-hair Belting,' then they knew perfectly well it was not 'Reddaway's Camel-hair Belting.' Therefore, you know at present you must shew that they have offered it in such a way as to lead people to believe that it was Reddaway's belting, because as long as they offered it as Bentham's camel-hair belting your own witnesses say that they would not for a moment take it as Reddaway's camel-hair belting." To this Mr. Bigham, the leading counsel for the plaintiffs, said: "I cannot dispute, and I believe it is the fact, that they have offered it and that they have advertised it as Bentham's camel-hair belting. I cannot prove any sale except a sale under the description contained in the circular." If the illustrations of the beltings in the circulars are looked at it will be seen that the defendants apparently stamped their beltings with their trade-mark, as it was proved the plaintiffs stamped their beltings with their trade-mark.

Now comes the question, Where is the evidence that the defendants sold or attempted to sell their beltings under circumstances calculated to mislead purchasers? Certainly not by the circulars and price-lists, for the plaintiffs' own witnesses said that they were not calculated to deceive, and there was no evidence in contradiction of this. There is no evidence given by the plaintiffs to shew that the belting sold by the defendants is not sold with the defendants' trade-mark thereon, as delineated in the illustration of the belting which appears upon the circulars; and this may well account for the plaintiffs being

unable to call a single witness to state that he had been deceived by what the defendants had done. It is, however, sufficient, in my judgment, to say that the plaintiffs have given no evidence of a sale or attempted sale by the defendants of belting under circumstances likely to deceive the purchasers except as may appear in the circulars and price-lists, which, for the reasons above, is no evidence at all. Lindley and Lopes, L.JJ., are of opinion that the words "Reddaway" and "Bentham" will in commerce soon be dropped, and that the purchasers buying "camel-hair belting," and intending to purchase Reddaway's, may get the defendants' belting, and in this may be deceived, and that this consequently affords evidence which should have been left to the jury, upon the question as to whether the defendants had done or were doing anything likely to deceive purchasers. With very great deference, I cannot agree in this. In the first place, no evidence was given that this would be the case—that is, that the prefix of "Bentham" would be dropped—and without evidence upon this point I do not see why it should be assumed that the prefix would be dropped any more than that it would be retained. In the next place, it was not suggested that it had been dropped when the action was brought, or, indeed, since; and, thirdly, no case about this dropping of the prefix was made or suggested by the plaintiffs at the trial. I agree that if the plaintiffs could have shewn that the defendants were selling or attempting to sell their beltings as "camel-hair beltings" alone, that would have been evidence that they were doing something likely to deceive purchasers; but no such evidence was forthcoming. My brother Cave had to direct upon the case before him as made by the plaintiffs, and he nonsuited upon the ground that the plaintiffs had given no evidence that the defendants had done or were threatening to do anything likely to deceive purchasers, and I think he was right. I do not think that the Court of Appeal should overrule the direction of a judge when the judge was right upon the case as made before him. If any better case can be made by the plaintiffs for something the defendants may do hereafter, well and good; but that does not make the direction of the judge wrong. I need not add that I give this judgment with great diffidence, seeing that

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Lindley and Lopes, L.JJ., do not agree with me; but holding, as I do, a strong opinion upon the matter, I am bound to express it.

In my judgment this appeal should be dismissed, and with costs.

New trial ordered.

Solicitors for plaintiffs: *W. J. & E. H. Tremellen, for A. Macdonald Blair, Manchester.*

Solicitors for defendants: *Bower, Cotton, & Bower, for Lynde & Braithwaite, Manchester.*

M. W.

C. A. 1892 *July* 21, 22.

[IN THE COURT OF APPEAL.]

THE ASSICURAZIONI GENERALI AND SCHENKER & CO. *v.* THE SS. BESSIE MORRIS COMPANY, LIMITED, AND BROWNE.

Ship—Charterparty—Excepted Perils—Disablement of Ship—Duty of Shipowner to repair Ship and complete Voyage—Constructive Loss.

When a shipowner has agreed by charterparty that his ship shall proceed to a port of discharge and there deliver the cargo, unless prevented by the excepted perils, and the ship has to put into a port of refuge for repairs, the shipowner is liable in damages for abandoning the voyage at that port without the consent of the charterers, unless the effect of the excepted perils proves to have been such as to make it either physically impossible to complete the voyage, or so clearly unreasonable as to be impossible in a business point of view.

The doctrine of constructive loss applies only as between an underwriter and his assured.

APPEAL by the defendants, the Bessie Morris Company, against a judgment of Collins, J. (1)

The following statement of facts is abstracted from the judgment of the learned judge:—

The action was in substance by charterers against captain and shipowners, for the sum of 424*l.* 14*s.* 9*d.*, alleged to be due from the defendants under two instruments dated February 15 and 23, 1888, signed by the defendant Browne as master of the steam-

(1) [1892] 1 Q. B. 571.

ship *Bessie Morris*, of which the first-named defendants were the owners. The statement of claim contained allegations to the following effect:—

By the terms of a charterparty entered into in London between the plaintiffs, Schenker & Co., as charterers, and the defendants, the SS. Bessie Morris Company, Limited, and dated January 31, 1888, it was (among other things) agreed that the steamship should proceed to Fiume, and to one, two, three, or four Adriatic ports, and there load a full cargo of lawful merchandise, and thence proceed to a safe port in the United Kingdom, and that freight should be paid by as much cash as the master might require for ship's disbursements at port of loading, not exceeding 200*l.*, to be advanced subject to 3 per cent. for interest and insurance, and remainder at port of discharge, on unloading and true delivery of the cargo, in cash, and that the captain of the steamship should sign bills of lading as presented; but, should the total freight shewn by bills of lading amount to less than the freight stipulated by the charterparty, the difference should be paid to the captain before sailing, and should the freight shewn by bills of lading amount to more than the freight stipulated in the charterparty, the difference should be paid before sailing to charterers by captain's promissory note, payable forty-eight hours after arrival at discharging port.

In accordance with the charterparty the vessel proceeded to Zante, Patras, and Fiume, and was loaded by Schenker & Co., who, by their agent William Morphy, paid to or for the defendants, and at their request, the sum of 124*l.* 3*s.* 9*d.* for ship's disbursements at Zante and Patras, and Schenker & Co. paid a further sum of 120*l.* 11*s.* 3*d.* to or for the defendants, at their request, for ship's disbursements at Fiume. Bills of lading were signed by the defendant Browne, and the freight payable under them amounted to more than the freight stipulated by the charterparty, the difference amounting to 151*l.* 15*s.* 8*d.*

The defendant Browne for and in respect of the said disbursements and difference of freight signed and gave to Morphy, on

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behalf of the plaintiffs, and to the plaintiffs, respectively, two instruments as follows:—

"To W. Morphy, Steamship Agent.

"Patras, Feb. 15, 1888.

"Forty-eight hours after arrival of my vessel, the *Bessie Morris*, at London, I promise to pay to the order of Wm. Morphy, Esq., the sum of 124*l.* 3*s.* 9*d.* stg., received by me for necessaries, for which I hereby pledge my ship, freight, and owners."

"Fiume, Feb. 23, 1888.

"Forty-eight hours after arrival of my vessel SS. *Bessie Morris*, at London, I promise to pay to the order of Messrs. Schenker & Co. the sum of 272*l.* 6*s.* 11*d.* stg., being difference of freight and advance disbts. at Fiume, for which I hereby pledge my ship, freight, and owners."

The vessel afterwards proceeded upon her voyage to London, until at Gibraltar the defendants wrongfully abandoned the said voyage, and by reason thereof the vessel never arrived at London.

The instrument of February 15, 1888, was, in consideration of the payment to Morphy by Schenker & Co. of the said sum of 124*l.* 3*s.* 9*d.* advanced by him as aforesaid, indorsed by him to Schenker & Co.

Afterwards, on August 16, 1889, the two instruments were indorsed and assigned for value to the Assicurazioni Generali.

The plaintiffs as to the said sums of 124*l.* 3*s.* 9*d.* and 120*l.* 11*s.* 3*d.* in the alternative claimed the same as moneys lent by Schenker & Co. to the defendants, and as moneys paid by them to the defendants at their request.

The plaintiffs as to the said sum of 151*l.* 15*s.* 8*d.* in the alternative said that the defendants had received the freight payable under the bills of lading signed as aforesaid, and they claimed the 151*l.* 15*s.* 8*d.* as money received by the defendants for Schenker & Co.

In the further alternative, the plaintiffs claimed 424*l.* 14*s.* 9*d.* damages for the breach by the defendants of the charterparty in abandoning the voyage, whereby Schenker & Co. were prevented

from receiving the freight payable to them under the bills of lading.

The plaintiffs gave particulars as follows:—

"Particulars.

"1888.		£	s.	d.	£	s.	d.
"Feb. 15.	Disbursements at Zante and Patras				124	3	9
	Interest on the above from Mch. 22, 1888, at 5 per cent.				9	0	0
"Feb. 23.	Disbursements at Fiume .	120	11	3			
	Difference of freight:—						
	Freight shewn by bill of lading . 1401*l.* 15*s.* 8*d.*						
	Chartered freight . 1250*l.* 0*s.* 0*d.*	151	15	8			
					272	6	11
	Interest from March 22, 1888, at 5 per cent. .				19	4	1
					£424	14	9

At the trial the following facts were proved by admissions and documents. The vessel proceeded on her voyage to London on February 23, 1888. When near Gibraltar, on March 2, she went ashore, and was partially submerged. Of her cargo, which consisted of flour, barley, currants, and oil, some was jettisoned, some was washed out, and the rest had to be taken out of her. The barley was found to be unmerchantable and in a state of rapid deterioration; the flour was to some extent sea-damaged, and so were some of the currants. All the barley and flour and a large quantity of currants were sold at Gibraltar under the advice of surveyors, and some of the currants and a small quantity of oil were sent on to London on two other steamers, at a cost of 66*l.* 13*s.*, the original freight thereon being 113*l.* 10*s.* 7*d.*, which was paid by the consignees. A contract was made with salvors to get the ship off at an expense of 40 per cent. of her value delivered in Gibraltar. This service the salvors succeeded in accomplishing, and accepted 2900*l.* as their remuneration in

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respect thereof. She was then temporarily repaired at Gibraltar at an expense of 750*l.* These repairs were completed by April 25, and on that day she left Gibraltar for Oran, whence she procured a cargo of Esparto grass for Garston, where she arrived on May 10, earning a freight of 572*l.* 10*s.* 11*d.*

The learned judge was of opinion, from the admitted parts of the average statement, that the vessel when so repaired might have proceeded to London with the flour which was sold at Gibraltar, together with the remainder of the cargo which was forwarded to London in other bottoms, and would have done so in ordinary course, but for an arrangement with the cargo-owners, or their underwriters, at whose instance the flour was sold at Gibraltar, and the whole bill of lading freight properly treated in consequence as paid thereon.

The learned judge gave judgment for the plaintiffs, with costs against both defendants.

The Bessie Morris Company appealed.

Bigham, Q.C., and *Hurst*, for the appellants. The judgment of Collins, J., comes, in substance, to this, that a shipowner is bound to repair his ship when there is a constructive total loss, if he happens to have cargo on board. This is contrary to the authorities: *Moss* v. *Smith*. (1)

[BOWEN, L.J. In this case the shipowners were not prevented from repairing the ship, and they did, in fact, repair her.]

The defendants gave notice to the underwriters, and the underwriters repaired the ship. The Salvage Association intervened for the benefit of all persons concerned.

As to the amount of the damages, judgment has been given for the full amount of the notes. The authority of the master does not extend beyond the terms of the charterparty, and these notes go further. The plaintiffs were not entitled to notes for their disbursements. The amount due should be ascertained as general damages. The charterers took on themselves the risk of delivering sufficient cargo to cover their disbursements. The defendants were entitled to receive 1250*l.* from the charterers; they cannot sue for it, because there is a cesser of liability clause

(1) 9 C. B. 94.

in the charterparty; but the defendants have a right of set-off against the plaintiffs' claim.

Sir W. Phillimore, Q.C., and *Joseph Walton*, for the plaintiffs, were not heard.

LORD ESHER, M.R. One of the questions which have been discussed is the construction of the charterparty. The charterparty is a contract between the shipowner and the charterer that the former will take the cargo offered by the latter, and will carry it as directed by the charterer to a safe port in the United Kingdom, unless prevented by the perils of the sea, which are excepted in the charterparty. It is an absolute contract by the shipowner to carry the goods to the port named by the charterer, which in this case was London, unless prevented by the excepted perils of the sea. It became an absolute contract on the part of the shipowner to convey the goods to London, and the only thing which could excuse him from doing so was that he had been prevented by the perils of the sea. In applying this to the facts of the case, we have to see whether the shipowner, who never brought the ship to London, was prevented from so doing by the perils of the sea. The ship was stranded near Gibraltar. If she could not have been got off it is obvious that she would have been prevented from fulfilling the voyage by the perils of the sea. But she was got off. If she had been got off as a mere wreck, as explained by Maule, J., in *Moss* v. *Smith* (1), and could not have been repaired, either where she was or at any other place, so as to be able to complete the voyage within any time which could be considered a fulfilment of the contract, she would have been prevented by the perils of the sea from fulfilling that contract, though she might have been able to perform some other voyage. But, in fact, the ship was got off, and she was taken to Gibraltar, where she could be repaired. What is the duty of the shipowner in such a case? His duty is to repair the ship, if it is possible for him to do so. That the ship in the present case could, in fact, be repaired cannot be denied. But, as Maule, J., said, in the case to which I have referred, the possibility must be a business possibility. If it is possible in a

(1) 9 C. B. at pp. 102, 103.

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business sense of the word to repair the ship, the shipowner is bound to repair her. If the cost of the repairs necessary to enable her to complete the voyage contracted for would be more than the benefit which the owner would derive from them, then it would be impossible in a business sense to repair her. In the present case the ship was repaired at Gibraltar, and the cost consisted of the expenses of the salvage of the ship and of the repairs necessary to bring her to London. We know that she was repaired sufficiently to enable her to reach Liverpool by a voyage longer than that provided for by the charterparty, at a cost of 750*l.* in addition to the expenses of salvage. Any reasonably sensible shipowner would have acted as these shipowners did up to the time when they went to law. The repairs were executed at a cost very far less than the value of the ship, and, that being so, no reasonable shipowner having regard to his own interests would have failed to do the repairs. The shipowners were prevented from performing the voyage, not by the perils of the sea, but by their own wilful disregard of their contract, or, at any rate, by their misreading of it. They were bound to bring to London all the cargo offered to them by the charterers which it was possible for them to bring, unless they were prevented from so doing by the perils of the sea, and they were not prevented by those perils. There is really no ground for the argument which has been addressed to us. The only colour for it is to be found in the suggestion that the case is governed by the rules applicable to what is known as "constructive loss." But the doctrine of constructive loss can arise only between an underwriter and his assured. There is no underwriter concerned in the present case, and the doctrine of constructive loss has no application to it. The shipowners' contract has been broken by them. What are the damages to which the plaintiffs are entitled? The contract was to pay a lump sum for freight, and if any cargo arrived at the port of destination the shipowners would be entitled to the whole freight. But the freight is to be earned by the carriage of the goods, and by their carriage up to the end of the voyage agreed upon. If the shipowner did not perform the voyage at all, and he was not prevented from performing it by the perils of the sea, he is not entitled to any

freight. Here the shipowners failed entirely to bring the ship to London, and consequently they are not entitled to any freight. But before starting upon the voyage they borrowed some money from the charterers. This was either strictly a loan, or it was a part prepayment of freight, and in that point of view it was equally in substance a mere loan to the shipowners. The money was advanced to the master of the ship with the consent of the shipowners' agents at the port of loading, and there can, therefore, be no question as to the authority of the master to borrow the money. Indeed, if the master was left without money at Gibraltar, he had from that circumstance alone authority to borrow money for necessary disbursements about the ship. The shipowners have had the benefit of every shilling of the disbursements, and they are bound to repay to the plaintiffs the sum which they advanced. Beyond that the plaintiffs are entitled to any damages which they have suffered and which are the natural result of the shipowners' default. In my opinion, if the goods had been on board the charterers would have been entitled to have them back, and also to any profits which they would have made if the goods had been brought to the proper market. I think the decision of the learned judge was perfectly right, and he has only induced the appeal by his reference to the doctrine of constructive loss. The head-note to the report in the LAW REPORTS, which is, in fact, taken from the judgment, is perfectly accurate, except that the last sentence of it is unnecessary, and should be omitted. The appeal must be dismissed with costs.

BOWEN, L.J. I am of the same opinion. The shipowners' contract was that they would fulfil the specified voyage, unless they should be prevented by the perils of the sea. Their only excuse for the non-performance of the voyage would be, that its performance was prevented by the perils of the sea. The ship went aground; but, in order to shew that she was prevented from performing the voyage agreed upon by the perils of the sea, she must have become unnavigable for that voyage, either on the ground that it was impossible to get her afloat again, or that, on account of the extraordinary expenditure necessary for that purpose, it would be unreasonable to require the shipowners to

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incur it. In the present case, so far from the ship being unnavigable, or having been treated as such, she was repaired, and was put into a condition fit for the performance of her voyage. The test, what is the state of circumstances which entitles the shipowner to abandon the voyage, is obviously applicable only when he acts upon it; and if, whatever the expense of repairing the ship may be, he submits to incur it, it would be absurd to discuss the question of constructive loss. The law on this point is as plain as possible, and it is laid down by Maule, J., in *Moss* v. *Smith* (1), where he says: "However damaged the ship may be, if it be practicable to repair her, so as to enable her to complete the adventure, she is not totally lost. The ordinary measure of prudence which the Courts have adopted is this — if the ship, when repaired, will not be worth the sum which it would be necessary to expend upon her, the repairs are, practically speaking, impossible, and it is a case of total loss." It is obvious from the words which he uses that the learned judge is discussing the measure of prudence which would justify the shipowner in abandoning the voyage. He is not dealing with the question what the law would be if the ship had actually been made navigable. In the same case Cresswell, J., said (at p. 105): "When is the shipowner said to be prevented by perils of the sea from fulfilling the contract he has entered into? When the ship is, by a peril of the sea, rendered incapable of performing the voyage. A ship is not rendered incapable of performing the voyage when she is merely damaged to an extent which renders some repairs necessary; if that were so, any the most inconsiderable damage, such as the loss of her rudder, without which she could not proceed, would render her incapable of fulfilling the contract contained in the bill of lading. But, if a ship sustains so much sea-damage that she cannot be repaired so as to be rendered competent to continue the adventure, then the owner is prevented by a peril of the sea from fulfilling his contract. If the ship is totally destroyed or sunk, the performance of the contract is obviously prevented by a peril of the sea. The Courts of Law have also engrafted this qualification upon the contract—that, if the damage which results from a peril of the

(1) 9 C. B. at p. 103.

sea is so great that it cannot be repaired at all, or only at a cost so ruinously large that no prudent owner would undertake the repairs, the owner may treat the loss as total, and say that he is prevented by a peril of the sea from performing his contract." That learned judge also is discussing the measure of prudence which will justify the shipowner in abandoning the voyage, and is not referring to a case in which the ship has been actually put afloat again. In the present case, the answer to the contention of the shipowners is, that the ship never was unnavigable, that she never was incapable of performing her voyage. Even assuming that the circumstances were such as would have justified the owners in abandoning the voyage, they never adopted that course. If the argument for the appellants be right, it must go to this length, that the ship would have been incapable of performing the voyage, even though she had actually performed it with all the cargo on board. This is a reductio ad absurdum. The fallacy consists in applying to a case in which the ship was not in fact prevented from performing the voyage the test of the measure of prudence which would justify the owner in not performing it. The voyage contracted for not having been in fact performed, the lump sum for freight never became payable, and the sums which were advanced to the master for disbursements must be repaid by the owners.

KAY, L.J. I agree. The voyage contracted for by the charterparty was never completed. The defence of the owners is, that the completion was prevented by the perils of the sea, which are excepted in the charterparty. To this defence there are several answers. One is that which my brother Bowen has called a reductio ad absurdum. The voyage was in fact completed to England, though the ship went to Liverpool instead of to London. The completion of the voyage was not prevented by the perils of the sea. It is said the cost of repairing the ship was so great, that, although the voyage was in fact completed, she might have been treated as a constructive total loss. There is no authority for this proposition. Moreover, there is not a tittle of evidence that, when the ship had been repaired, she was not worth more than the sum expended upon her. It is

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said that advanced freight cannot be recovered by the charterers when the ship is lost. But here the 200*l.* limit mentioned in the charterparty was exceeded, and the advance was made on a distinct engagement by the master to repay it on the arrival of the vessel. The money was advanced on the terms that it was to be treated as a loan, and the owners cannot keep the money and repudiate the conditions on which it was advanced. They say they have a right of set-off against freight; but that cannot be so, when the freight never became payable at all. The appeal is altogether misconceived, and it must be dismissed with costs.

Appeal dismissed.

Solicitors for plaintiffs: *Stokes, Saunders, & Stokes.*

Solicitors for defendants: *Field, Roscoe & Co., for Bateson, Warr, & Bateson, Liverpool.*

W. L. C.

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[IN THE COURT OF APPEAL.]

HEWLETT *v.* ALLEN & SONS.

Master and Servant—Wages—Payment otherwise than in Current Coin—Deductions for Sick and Accident Club—Truck Act (1 & 2 *Wm.* 4, *c.* 37).

The plaintiff was in the employment of the defendants, and on entering their service she signed an agreement by which she bound herself to conform to all the rules and regulations of the firm. One of the rules was that all the employés were to become members of the sick and accident club, and the rules of the club provided for a weekly subscription to the club funds proportioned to the wages of each contributor. A deduction was accordingly made each week from the plaintiff's wages, and paid over to the fund. On leaving the defendants' service the plaintiff sued to recover the amount of such deductions except so much as represented her contribution for medicine or medical attendance:—

Held (affirming the judgment of the Queen's Bench Division), that the agreement signed by the plaintiff could not, by reason of the Truck Acts, be vouched by the defendants to justify the deductions or as an authority by the plaintiff to pay the contributions on her behalf to the fund, but that the plaintiff was precluded by her acquiescence in such payment from recovering the amount from the defendants.

APPEAL from a judgment of the Queen's Bench Division on appeal from a county court.

The plaintiff was in the service of the defendants, and when

she entered their service she signed an agreement by which she bound herself to conform to all the rules and regulations of the firm. One of the rules was : "All employés will have to become members of the sick and accident club." The rules of the club, called "The Amicable Griffins' Sick and Benefit Society," provided for a weekly subscription to the fund proportionate to the weekly wages of each contributor. A member of the firm was to act as treasurer, and the business of the club was to be conducted by a committee of members. A proportionate deduction was accordingly made each week from the plaintiff's wages and paid over to the fund. On leaving the service of the defendants the plaintiff sued in the county court to recover the amounts so deducted, but the claim was reduced by the withdrawal of so much as it was agreed represented contribution for medicine or medical attendance, and judgment was entered for the balance. The Divisional Court reversed this judgment, and directed judgment to be entered for the defendants.

The plaintiff appealed.

1892. Aug. 4. *Corrie Grant*, and *Compton-Smith*, in support of the appeal. The Truck Act (1 & 2 Wm. 4, c. 37), makes all deductions from wages illegal except such as may be made under ss. 23 and 24. Sick pay or a payment on the death of a member do not come within either of those sections. The Truck Amendment Act, 1887 (50 & 51 Vict. c. 46), brought the plaintiff within the former Act, and the judgment of the county court should be restored.

[They cited *Cutts* v. *Ward* (1), *Pillar* v. *Llynvi Coal Co.* (2), *Ex parte Cooper* (3), and *Lamb* v. *Great Northern Ry. Co.* (4)]

Finlay, Q.C., and *Crispe*, for the defendants.

Cur. adv. vult.

1892. Aug. 10. BOWEN, L.J., read the judgment of Lord Esher, M.R., and himself. This case raises a very important inquiry as to the meaning and construction of the Truck Acts, and more particularly of sections 2, 3, 4, and 23 of 1 & 2 Wm. 4, c. 37. The plaintiff was, at different periods ranging over some

(1) Law Rep. 2 Q. B. 357.
(2) Law Rep. 4 C. P. 752.
(3) 26 Ch. D. 693.
(4) [1891] 2 Q. B. 281.

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years, in the employ of the defendants, who are proprietors of large confectionery works, and her action was brought to recover arrears of unpaid wages amounting to 1*l.* 13*s.* 7*d.* The contention of the defendants is that the sums sued for are deductions which represent payments, made with the plaintiff's consent during the period of her service, to a sick and benefit society in connection with the works, and that such deductions either are excepted by s. 23 from the general scope of the Act, or else are payments made, at her request, to a fund under circumstances which would constitute a defence for the defendants by way of set-off or counter-claim or otherwise.

The case was heard before the county court judge. At the hearing the plaintiff withdrew from her claim the sum of 6*s.* 9*d.*, which represented contribution for medicine and medical attendance, and the judge directed judgment to be entered in her favour for the residue—1*l.* 6*s.* 10*d.*—on the ground that the defendant, by reason of the Truck Acts, could not justify the retention or deduction of the latter sum. The Divisional Court reversed his judgment, and the appeal has been brought, by leave, from their decision.

The clear intention of the Truck Acts was to ensure to workmen the payment of the entire amount of their wages in actual current coin of the realm, unfettered by any promise or obligation that it should be spent in any particular manner, or at any particular shop. The legislature endeavoured to secure that the workman might have in his hand the very actual coin representing his wages, in order that he and his family might freely carry it home, or expend it without impediment in the open market. Subject to certain exceptions, to be considered hereafter, such was (speaking broadly) the object of this legislation. The Truck Act of 1831—with which alone for the practical purposes of this case we need concern ourselves, for the statute of 1887 does not substantially differ so far as this case is concerned—attempted to enforce this object by rendering illegal every payment, or contract for payment, of wages, except in the mode provided by the Act. One head of sections imposed penalties upon all those who made such illegal contracts or payments. Another class of sections, the range of which was not altogether

commensurate with the former, gave the right to the workman to recover the arrears of wages not actually paid over in coin, while it prevented the employer from setting up, in answer to such action, some rights of set-off of which he might otherwise, at law, have availed himself; while, on the other hand, other rights of set-off were still left available to the employer. It is on the effect of this latter portion of the legislation, and the similar provision in the later statute, that this appeal, in our view, turns, and the present case depends mainly on the exact extent to which an employer's ordinary defence to an action-at-law has in circumstances like the present been interfered with by the Acts. The portion of the Act which deals with penalties is, nevertheless, worthy of consideration, since it may throw some light on the entire scope of the Acts, as also on the construction of special parts of them.

After reciting that it is necessary to prohibit the payment (in certain trades) of wages in goods, or otherwise than in the current coin of the realm, the statute (1 & 2 Wm. 4, c. 37), by s. 1, enacts that, if in any contract the whole, or any part, of a workman's wages shall be made payable in any other manner than in current coin of the realm, such contract shall be illegal, null, and void. The same fate is (under s. 2) to befall any contract in which any provision directly or indirectly is made respecting the place where, or the manner in which, or the persons with whom, the whole or any part of the wages shall be laid out or expended.

These two first sections of the Act prohibit contracts which infringe on the prescribed limitations. Sect. 3 deals, not with contracts, but with actual payments. The entire amount of the wages earned—it provides—"shall be actually paid to such artificer in the current coin of this realm, and not otherwise," and every payment made to such artificer by his employer of or in respect of any such wages by the delivery to him of goods, or otherwise than in the current coin aforesaid (except in certain excepted cases), is declared to be illegal, null, and void. Sect. 8 contains an exception in the case of bank-notes and drafts on neighbouring bankers, and s. 23 a further exception in respect of specific deductions which are declared to be legitimate. Sect. 10 deals with penalties on offenders against the Act.

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Pausing here to consider what payments have been prohibited by the statute, we find that in order to be valid the payment to a workman must be of the entire amount of the wages due, and that it must be actually paid to the artificer in current coin of the realm, excepting in the excepted cases of bank-notes and cheques (s. 8) and of specific deductions (under s. 23). The statute insists (in all but the excepted cases) on actual payment in coin. Payment in account will not do. Payment in goods will not do. Nothing is to discharge the wages debt except actual payment in current coin. The first gloss or interpretation which we think principles of sound construction (in a highly penal Act) require us to adopt, is that the payment will not be invalid simply because instead of being made to the artificer himself, it is made to anybody lawfully and bonâ fide appointed to receive it as his agent. It cannot have been intended, where what is paid over is current coin of the realm, to make it a penal offence to pay such current coin to a man's wife or child instead of to the man himself. The principle of the common law is that what is paid to a man's agent lawfully authorized to receive it is paid, in the eyes of the law, to himself; and although the language of a statute may of course provide that none but an actual personal payment shall suffice, unless this intention is to be discovered in the statute the ordinary rule of the law applies. The point at which the statute aims appears to us to be that the entire amount should be paid in coin, and the statute has not interfered with the ordinary doctrine that what is paid to a man's agent is to be treated as if it were paid to himself. It is hardly necessary to observe that since the Act prescribes payments *in coin*, deductions made by the employer, whether authorized by the workman or not, do not and cannot be payment to the workman in current coin of the realm. The employer cannot, for the purpose of compliance with the statute, be both payer and payee. To hold otherwise would be to make the statute idle. Secondly, it is to be observed that the legislation as to contracts for payments runs parallel to and is commensurate with the legislation as to payments. If the payment is in an illegal shape, the contract to make it in that shape is also declared, not merely null and void, but also illegal. The result is,

that when such illegal contract has been made an offence against the Act has been committed, and the other doctrines of English law applicable to illegal as distinct from merely voidable contracts follow. Not merely cannot such a contract be enforced, but the contract cannot by itself give rise to any right, or be vouched as an authority for any act done under it.

So far we have dealt with the prohibitory portion of the Act. We pass next to those provisions of the Act which affect directly civil litigation and the defences open to an employer who is sued for all the arrears of wages which he has not actually paid in current coin. This part of the legislation begins with s. 4, by which it is enacted that every artificer shall be entitled to recover from his employer so much of his wages earned as shall not have been actually paid to him by his employer in the current coin of the realm. The effect of this section by itself would be that in any action brought to recover the wages an employer could not plead as "payment" anything but an actual payment in current coin save only in the cases excepted in other sections of the Act. But it is manifest that if no further provision was to be made an action by workmen for such arrears might be barred and the objects of the statute defeated by other defences which at law would be left open still to the offending employer. The employer might, for example, have supplied goods to the amount of the wages deducted, or the workman might by virtue of an express or other agreement with his employer have taken some consideration other than goods in place of the wages, or have authorized the employer to spend the money in some way which, though not payment in actual coin, might in an action to recover the arrears of wages be set up by way of legal or equitable set-off, or used as a counter-claim to the action.

Sect. 5 accordingly follows s. 4, and is a section devoted to limiting a possible right of set-off. It will be seen that it extinguishes such right of set-off only in certain cases, leaving rights of legal and equitable set-off untouched in all other instances than those specifically mentioned. It is provided in the section that, in such actions to recover wages due, the defendant shall not be allowed to make any set-off, nor to claim any

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reduction of the plaintiff's demand, by reason or in respect of any goods, wares, or merchandize had or received by the plaintiff as or on account of his wages or in reward of his labour. The price of the goods in virtue of which the unpaid wages were deducted cannot accordingly be set off. But the section goes further and debars the employer also from any set-off arising out of the sale to his workman of any other goods supplied at any other time, either by the employer's own shop or by any shop in the profit of which the employer has an interest. The statute draws its line of tutelary shelter here, and a similar though not an absolutely identical line is drawn in the Act of 1887. Beyond these lines all legal and equitable rights of set-off, and all legal and equitable defences other than payment, are still left open in any civil action to the employer.

The above analysis of the leading sections of the earlier Act shew that the penal sections of the Act and the provisions which affect the civil rights of the parties do not cover precisely the same ground. The payment in current coin of a portion only instead of the entire wages may be an offence against the Act, and yet when the workmen sues to recover the unpaid portion the employer is not precluded in all cases and every case alike from enforcing every set-off or legal or equitable defence that he possesses, although in respect of certain specified dealings he is deprived of a particular set-off. The offence against the public may well be complete and the penalty have been incurred; but it does not follow that the employer is to pay the workman the full arrear left unpaid in current coin, where though not paid in current coin the claim of the workman has been released or satisfied in some other lawful way which falls short of being actual payment. Money payment at the request of the workman to a third person will be accordingly one amongst other conceivable defences left open to the employer by way of set-off, and facts which establish a right of equitable as well as legal set-off will also be available to the employer if they are outside the set-off forbidden by the Act.

It now becomes necessary to apply the above interpretation of the statute to the facts of the present action. On entering the service of the defendants the plaintiff signed an agreement by

which she bound herself to conform to all the rules and regulations of Messrs. Allen & Sons' works, and to submit to the penalties for breaches of the same. One of these rules and regulations (No. 28) was in the following terms: "All employés will have to become members of the sick and accident club." Its rules provide for a weekly subscription to the fund proportioned to the weekly wages of each contributor. By virtue of this contract a proportionable deduction was in fact made (each week) from the plaintiff's wages, which was carried or paid over to the fund on her behalf. In what manner the deduction found its way into the fund is not clear, since the defendants called no witnesses before the county court judge; but it was stated to us, and did not appear to be disputed, that the deductions were taken each week to the secretary of the fund, who paid them into an account kept at a separate bank by one of the defendants' firm acting as treasurer to the fund. That the plaintiff herself knew of the deductions being made was evident, inasmuch as she had been for years in the defendants' service, during which period she had twice left and twice returned and re-engaged herself, signing on each occasion the agreement above referred to.

It is at this stage desirable to brush away one or two legal points which might otherwise obscure the exact point of law we have to decide. It was not argued before us that the deductions made from her wages were only another mode of calculating her wages which took the case outside the Truck Act altogether (as in *Chawner* v. *Cummings* (1); *Archer* v. *James*. (2)) The defendants' counsel, on the other hand, urged upon us the argument that the deductions made came within s. 23 of the Act. This latter point seems to us untenable. The proportion of the arrears attributable to payments for medicine and medical attendance was struck out of the plaintiff's claim in the county court, and the other objects of the fund, viz., insurance against sickness, accident, and death are not within s. 23. The defendants' case, therefore, depends not on the construction of s. 23, but on the effect of the earlier clauses of the statute. It is clear (to begin with) that the contract between the defendants and the plaintiff that these deductions should be made was an illegal one. It

(1) 8 Q. B. 311. (2) 2 B. & S. 61.

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may well fall within the language of s. 2 of the Act of 1831 and s. 6 of the Act of 1887. But if the contract in question be even not within s. 2 of the former and s. 6 of the later Act, it appears to us still to be illegal under s. 1, as being a contract that the wages shall be paid otherwise than in current coin. No justification can therefore be found in the signed contract for anything done under it. That the plaintiff has not actually received her entire wages in current coin of the realm seems obvious. Has there been any actual payment in current coin of the realm to any one at all? On the evidence this seems most doubtful, and a mere shew of passing current coin from the firm to the secretary of the fund would not necessarily satisfy a Court or a jury that current coin was actually paid by the defendants to an agent of the plaintiffs lawfully authorized to receive it. An offence against the Act has therefore to all appearances been committed, for the burden lay on the defendants to shew the actual coin payment, and they have not chosen to call witnesses. But although an offence against the Act may have been committed it remains still to be ascertained whether in a civil proceeding the employer in this case may not have an answer to the plaintiff's claim by way of set-off, counter-claim, or otherwise. No notice of set-off or counter-claim was given. But we should not allow justice to be defeated upon a mere defect of pleading, and the matter in the Court of Appeal must be treated as if all facts had properly been pleaded which are undisputed in the case.

The question therefore arises whether the defendants are entitled on the facts of this case to say that, although an offence against the Act may have been committed, nevertheless the deductions from the plaintiff's wages have been disposed of with her consent in a manner which she cannot now impugn after the lapse of years. The defendants having called no witnesses, we cannot properly assume in their favour that the deductions were lodged in the hands of any third person for the purposes of the fund. We think, however, that having regard to the rules and the balance-sheet put in by the plaintiff, and the manner in which the case has been conducted, we must infer that a fund has been honestly and actually set aside in the defendants'

hands for the benefit of the contributors to the fund, to be applied from time to time according to its rules. To this fund we think we also must assume that the money professedly paid on behalf of plaintiff has honestly found its way, and nothing in our judgment is intended to reflect in the least on the good faith of the defendants either in the institution of the fund or in its management. If the trust fund to which money has been so paid was an illegal trust, the defendants could not set up as a defence payment to its credit of any sums at all. But the trust is not an illegal trust merely because it is made up of moneys collected from persons who have made illegal agreements to subscribe to it, subscription to it in lawful ways being perfectly possible. Fieri non debuit—factum valet. The purposes for which this money is held are not illegitimate. All that can be said is that, as an authority for carrying moneys to the fund, the defendants cannot rely on the workmen's contracts, all such contracts being illegal. But if an authority or a ratification can be found outside the original contract, that will be sufficient as a defence in this action. It could not be right that a workman should sanction the handing over of his contributions to a fund created for his own benefit and the benefit of others, and years afterwards recall his contributions. In the first place, such a gift or contribution once given would be irrevocable. In the second place, it would in all probability long since have been expended in the administration of the fund; and indeed we do not doubt but that the plaintiff's contributions have long since been appropriated to some of the ordinary expenditure of the society.

Did the plaintiff, then, authorize such contributions as professedly were made on her behalf to be so made and so expended? The original contract with the plaintiff cannot in law justify the deduction being made from her wages, nor in our opinion can it be vouched as of itself an authority by her to pay the contributions for her. The defendants cannot, therefore, fall back on the contract with the plaintiff to justify the payment over of her contributions to the fund. But the plaintiff has known for years of, and has acquiesced in, these deductions and their destination. She twice left the defendants' service, and has twice returned to

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it. She must also have known, not indeed of the details of the expenditure, but that the current contributions were in fact expended on the objects of the society. We do not think that she can years afterwards complain of what has been done with her knowledge and with her tacit assent. The Truck Act has been broken; but she has precluded herself by her own conduct, and by her long acquiescence in the payment to the fund of her contributions, from now recalling them. She does not, indeed, assert that she either objected to what was done or that she did not know of it; and the fact that she did not assent was not even alleged before us, nor was it suggested before the county court judge. The defendants can, therefore, avail themselves as an answer to this action, in the nature of a set-off or counter-claim, of the fact that these sums have been paid over, professedly on the plaintiff's behalf, to a trust fund of which S. Allen is trustee, and have been used for the purposes of the fund, and that she subsequently ratified and assented to such payment and expenditure.

It remains for us to pronounce an opinion as to the relevancy and applicability of some of the authorities cited in argument before us. *Cutts* v. *Ward* (1) is a decision on the construction of sect. 23, and has no bearing on the present inquiry. *Ex parte Cooper* (2) was a case the head-note and reported language in which requires explanation if not rectification. By an arrangement not in writing, sums were in that case deducted for wages for a doctor's fund and for a reading-room of which there was a treasurer. The fund was handed over by the employer to the doctor and treasurer from time to time; but at the time of the liquidation of the employers' firm, 149*l.* stood in the employers' books to the credit of the doctor's fund, arising from deductions from the wages which had been made but not yet paid over, and 63*l.* stood in like manner to the credit of the treasurer of the reading-room. No trust, it would appear, had been created by the direction of the men. "All that appears by the evidence," says Lord Selborne, "is that the workmen were desirous that what was in substance due from them to the doctor and for the reading-room should be paid through the machinery of a

(1) Law Rep. 2 Q. B. 357. (2) 26 Ch. D. 693.

retainer out of their wages." The employers' defence to the action accordingly failed on every ground. Actual payment in current coin there had been none so as to raise a valid plea of payment; no payment otherwise than in current coin had been made to the doctor or to the reading-room of which the employers could avail themselves by way of set-off. There had been no agreement with the doctor or the reading-room by which the workmen's debt had been discharged or under which the doctor had accepted the liability of the employer. There was nothing accordingly which amounted to any other legal or equitable defence, to any release for valuable consideration, or to any legal or equitable set-off or counter-claim. The actual decision in *Ex parte Cooper* (1) is, we think, entirely in conformity with our interpretation of the statute. The language of the judgments of the Court is not as clearly worded in the report as might be desired. "The employers have retained the amount out of the wages," says Lord Selborne; "but they have never paid it over, and there is no evidence to satisfy me that anything equivalent to payment to the workmen has taken place." Strictly speaking, payment over to the doctor, if it even had taken place, would have been a bar to the action, not because it was equivalent to payment in coin to the workmen, but because it would give rise to a defence on other grounds than that of payment. Lord Justice Cotton's suggestion, that if such payment had taken place it "might possibly amount to a payment in cash" (by which we incline to think he means current coin), "not to them (that is, the workmen), "but to their agent, or to a person on their behalf appointed to receive it," is an expression again not perfectly exact. For the purpose of the case it was not necessary to point out, what we nevertheless now think it desirable to make plain, that although such payment over would have taken the transaction out of the operation of the Truck Act, by amounting either to a set-off or other legal or equitable defence, it would not necessarily have been equivalent to or pleadable as payment, or in other words (s. 4), as an actual payment in current coin of the realm.

The Court below appear to have considered that the present

(1) 26 Ch. D. 693.

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HEWLETT v. ALLEN & SONS.

Bowen, L.J.

appeal was governed by the authority of *Lamb* v. *the Great Northern Ry. Co.* (1) It appears to us that the point on which our judgment in this case hinges either did not arise or was not at all considered in that case. The deductions there were made as contributions to a sick and funeral allowance fund. The fund was for the benefit of the defendants' servants, and was managed on their behalf by the defendants. The case was really decided by A. L. Smith and Grantham, JJ., on the ground that a larger sum had actually been paid out of the fund for medical attendance on the plaintiff and his wife than the total amount of his contributions which he sought in the action to recover. Inasmuch as such payments could be lawfully deducted under s. 23 the action necessarily failed. The question, what would have been the result if it had been otherwise, and the contribution had not, in fact, been actually expended for the plaintiff at his request, under s. 23, did not accordingly occur. It might have otherwise become necessary (as here) to consider whether the defendants in that case had constituted themselves trustees of any fund left in their hands for distribution under a binding trust, and had actually distributed the same as moneys appropriated to trust purposes under the plaintiff's own direction. We cannot, therefore, agree with the Divisional Court in their view that the present case is covered by the decision in *Lamb's Case* (1), although our conclusion is that their judgment must, for the reasons we have given, be affirmed. But as we are not satisfied that the action of the defendants in respect of this fund has been consistent with the provisions of the Truck Act, we think that, although the plaintiff's civil claim against the defendants fails, there ought to be no costs in this appeal, although we do not in the least doubt that the defendants' conduct in respect of the fund has been dictated by kindly and humane motives and characterised by good faith.

KAY, L.J. I agree in the main with the judgment which has been read, and particularly I agree that the deduction made in this case was primâ facie a deduction contrary to the spirit and the language of the Truck Act which has been referred to; but

(1) [1891] 2 Q. B. 281.

in this particular action we have to consider not merely that, but whether the subsequent conduct of the plaintiff in the action has not been such as to debar her from the remedy which primâ facie she had to recover the arrears of her wages under the provisions of the Truck Act.

Now, I have been very careful to consider the evidence in this case, and I confess that on the meagre materials before us I am not able to make out that the defendants had any set-off at law or in equity of the nature which is allowed by s. 5. Sect. 5 of the Act of 1 & 2 Wm. 4, does disallow certain grounds of set-off, and therefore impliedly leaves unaffected other grounds of set-off which the employer may possibly have. I do not think, as I have said, that in this case any ground of set-off not excepted by that section could be made out, either equitable or legal, because I do not think there is any real evidence that the deducted parts of these wages have, in fact, been paid in cash to any one by authority of the plaintiff; but I agree that the circumstances may raise a case of counter-claim, and the hesitation which I have had is really this, whether a case of counter-claim—that is, a cross-action which may now be brought by counter-claim—would be a sufficient answer to a claim such as this under the Truck Act. I doubt whether an employer can legally justify a refusal to pay wages in cash by alleging that he has—not a set-off, but—a cross-claim for damages to a greater amount. That is not strictly a defence like set-off. The other members of the Court are of opinion that he may, and of course I will not set my opinion against theirs for a moment; but, having that doubt, I think it proper to express it, because, of course, this decision will be a precedent in future cases which may arise under the Truck Act.

Appeal dismissed.

Solicitors for plaintiff: *Shaen, Roscoe, Massey & Co.*
Solicitor for defendants: *Milner Jutsum.*

A. M.

C. A.

1892
Aug. 10.

[IN THE COURT OF APPEAL.]

GUARDIANS OF THE WEST HAM UNION, APPELLANTS; CHURCHWARDENS, OVERSEERS, AND GUARDIANS OF THE PARISH OF ST. MATTHEW, BETHNAL GREEN, RESPONDENTS.

Poor Law—Settlement—Residence while under Sixteen apart from Parent—Irremoveability—Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 *Vict. c.* 61), *s.* 34.

A pauper had resided, in domestic service, from the age of fourteen to the age of eighteen, in a parish in the appellant union. Her father was dead and her widowed mother resided outside the appellant union:—

Held (affirming the judgment of the Queen's Bench Division), that as the pauper was living away from her family the proviso in 11 & 12 Vict. c. 111, did not apply, and that she could, though under sixteen, acquire a status of irremoveability, and that, therefore, the time during which she was under sixteen ought to be reckoned in determining whether she had acquired a settlement in the parish under s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876, by residence for a term of three years under such circumstances in each year as would render her irremoveable.

APPEAL from a judgment of the Queen's Bench Division, reported ante, p. 65, on a special case stated on appeal against an order of a metropolitan police magistrate, adjudging the parish of Low Leyton, in the appellant union, to be the last legal settlement of Caroline Batchelliar.

The father of the pauper died when she was quite young. The pauper lived with her mother at places outside the appellant union, and a few days before she attained the age of fourteen she went into domestic service in the parish of Low Leyton, and resided there without interruption until a few days before she became eighteen years of age, when she again went to reside with her mother, and so continued till she became chargeable on the respondent parish.

The Court of quarter sessions dismissed the appeal, and on appeal to the Queen's Bench Division judgment was given for the respondents. (1)

The appellant union appealed against this judgment.

1892. Aug. 9. *Jelf, Q.C.*, and *R. D. Muir*, in support of the appeal. Before she attained the age of sixteen the pauper could

(1) Ante, p. 65.

not acquire a status of irremoveability. Her mother was residing out of the appellant union, and the pauper, though in service, remained a member of her mother's family, and could have been removed to her mother's settlement. In *Guardians of Highworth and Swindon Union* v. *Guardians of Westbury-on-Severn Union* (1), the pauper was residing with her mother, and each of the three years was a year in which she was irremoveable.

[They cited also *Reg.* v. *Elvet* (2); *Reg.* v. *Glossop* (3); *Reg.* v. *Leeds Union* (4); *Reg.* v. *Inhabitants of St. Ebbe's* (5); *Reg.* v. *Inhabitants of Pott Shrigley* (6); *Reg.* v. *Abingdon* (7); *Guardians of Dorchester Union* v. *Guardians of Weymouth Union.* (8)]

Beven, contrà. To distinguish this case from *Guardians of Highworth and Swindon Union* v. *Guardians of Westbury-on-Severn Union* (1), it must be shewn that a different rule applies whether the child does or does not reside with the parent. When the pauper had resided one year in the appellant union she became irremoveable, and remained irremoveable, for the three following years, irrespective of the question whether she was under or over sixteen. A child under sixteen can, by going into service, become emancipated: *Guardians of Holborn* v. *Guardians of Chertsey* (9)—a case that was reversed on appeal, but only on a question of fact. (10) [He cited also *Guardians of Mitford and Launditch Union* v. *Guardians of Wayland Union* (11), and *Reg.* v. *St. George's-in-the-East.* (12)]

Jelf, Q.C., in reply. The argument for the respondents does not touch the proviso in 11 & 12 Vict. c. 111. (13) If the mother

(1) 14 App. Cas. 465.
(2) 2 E. & E. 266.
(3) 12 Q. B. 117.
(4) 4 Q. B. D. 323.
(5) 12 Q. B. 137; 18 L. J. (M.C.) 14.
(6) 12 Q. B. 143; 18 L. J. (M.C.) 33.
(7) Law Rep. 5 Q. B. 406.
(8) 16 Q. B. D. 31.
(9) 14 Q. B. D. 289.
(10) 15 Q. B. D. 76.
(11) 25 Q. B. D. 164.
(12) Law Rep. 5 Q. B. 364.
(13) 11 & 12 Vict. c. 111, recites 9 & 10 Vict. c. 66, s. 1, repeals the proviso at the end of that section, and substitutes the following: "Provided always, that whenever any person should have a wife or children having no other settlement than his or her own, such wife and children should be removeable from any parish or place from which he or she would be removeable, notwithstanding any provisions of the said recited Act, and should not be removeable from any parish or place from which he or she would not be removeable by reason of any provision in the said recited Act."

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had come into the parish and become chargeable, she would have been removeable, and the pauper with her.

Cur. adv. vult.

1892. Aug. 10. LORD ESHER, M.R. The Divisional Court has decided that the pauper obtained a settlement in the union in which she had in fact lived for more than three years in service. When she first went into service she was about fourteen years of age, and she remained in the same parish four years. Her mother did not live in that parish, and had no settlement there; so that if the irremoveability while under sixteen is to be determined by that of her mother, she did not acquire a settlement; but if she could while under sixteen acquire irremoveability, then she has, by residing in the parish for the term of three years, under such circumstances in each of such years as would render her irremoveable, acquired a settlement there. The law of settlements gave rise to much litigation, for it was so intricate and refined that it was exceedingly difficult for the parochial authorities to determine whether a pauper was settled in their parish or not. The first step towards simplifying the law was the creation of the status of irremoveability. That did not do away with the old law of settlement; but then it was enacted that irremoveability for a certain time should create a settlement. We have, therefore, to investigate the question of irremoveability, and if the pauper was irremoveable for three years the question of settlement is determined. It is not necessary to determine whether residence for three years where the pauper was removeable in the first, but not in the others, would create a settlement, because this case stands differently. During the currency of the first year it is obvious that the pauper could have been removed; but at the end of the first year, by the plain words of 9 & 10 Vict. c. 66, s. 1, unless the proviso comes in, the pauper was irremoveable. The Act says that no person shall be removeable from any parish in which such person shall have resided for five years next before the application for the warrant, and that term has by subsequent legislation been reduced to one year. The pauper resided for one year, and that produced irremoveability in the second, and the same applies to the third and

fourth; so that in each of these years, if that is required, the pauper was irremoveable, and thus acquired a settlement. It is said, however, that the proviso alters this. I think it may be taken that this was meant as a humane enactment, under which the family was to be considered as one, and, to prevent a part being sent to one place and a part to another, the whole were to follow the settlement of the head of the family. But if the legislation was to prevent the dispersing of families, it would not apply to cases where no such question arose, and that was the decision of Cockburn, C.J., in *Reg.* v. *Leeds Union.* (1) In that case the Chief Justice had to consider whether the child, though in fact living elsewhere, was in contemplation of law residing with the mother. If a child residing with its parents pays a visit to a friend, no one would suggest that it was not, in spite of its temporary absence, residing with its parents. So if a child is at school, in a parish different from that in which its parents live, it continues constructively to reside with them by virtue of the parents' authority to take the child back at any moment. Here we have the case of a child living in service in her master's house and away from the authority and control of her mother, and she cannot be said to have been constructively resident with her mother any more than the child whose case was considered in *Reg.* v. *Leeds Union.* (1) It has been held that a child gains a settlement if she is irremoveable for a year while she is under sixteen and for two years after she is sixteen; so that if the decision in *Reg.* v. *Leeds Union* (1) is to be supported, the settlement of the pauper in this case is determined in the appellant union in which she has resided. I think the decision is one we cannot and ought not to overrule. It produces simplicity, carries out the object of the Act, and prevents the need of going into questions as to the father and mother. Even if I differed in opinion from the principle laid down in that case—which I do not—I think we ought not to overrule it, and I am consequently of opinion that the judgment of the Divisional Court should be affirmed.

BOWEN, L.J. I am of the same opinion. I consider that the point before us was not decided by Lords Halsbury or Watson

(1) 4 Q. B. D. 323.

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in the case of *Guardians of Highworth and Swindon Union* v. *Guardians of Westbury-on-Severn Union* (1), and so far as the judgment of the Court below seems to shew that they thought otherwise, I cannot follow their ruling. To my mind this case turns on the question whether at the end of her first year of residence in the appellant union the pauper had acquired a status of irremoveability. If she had, this continued for each of the three following years. In order to see how the matter stands, we must first determine whether the pauper was as a matter of fact resident in this parish, and secondly, whether, if she was so resident, the proviso prevents that residence from being such as to give her a status of irremoveability. As to the question of residence, I have nothing to add to what has been said by the Master of the Rolls. For the purpose of determining the other point, we may take the provisoes of the two Acts as equivalent. There is a difference, but it is not material in considering this case. Now the construction of a proviso must be such as not to create a fresh right, but to limit the operation of the section to which the proviso is added, and in that view the decision in *Reg.* v. *Leeds Union* (2) is to be understood. The embarrassment and difficulty caused by the law of settlement were met by the provisions as to irremoveability; but one limitation was placed on those provisions—a limitation derived from principles of humanity, as pointed out by Cockburn, C.J., in *Reg.* v. *Leeds Union.* (2) That case was a remarkable one. The child had been altogether severed from the authority and custody of its mother and handed over to the care of others. The Chief Justice held that the child, under such circumstances, had acquired sufficient independence to be taken to have been resident in the place where it was in fact living. That being so, it remained to be considered whether the pauper had acquired a status of irremoveability by three years' residence, and in considering that point the proviso had to be dealt with and a construction put on it. The object of the proviso is historical, and we know that it was to prevent separation of families and to secure that the irremoveability of part of a family was not to be taken to enure or to have arisen when the irremoveability of the head of

(1) 14 App. Cas. 465. (2) 4 Q. B. D. 323.

the family did not arise. But the Chief Justice thought that it was directed to the case where members of the family were together, and did not apply to the case before him. This view that the proviso is applicable to children continuing members of the parents' family was also taken in *Reg.* v. *St. Mary Arches, Exeter* (1), and, so far as I know, has not since been impugned, but has been accepted as sound by this Court (though not in a way to bind us in the case now before us) in *Guardians of Mitford and Launditch Union* v. *Guardians of Wayland Union* (2), where the Master of the Rolls and Fry, L.J., both approved of the limited construction. Whether that view would be that which I should adopt independently, I do not know; but, finding it laid down and acted on for so long a time, I think it should not be disturbed. I consider the present case is governed by the decision in *Reg.* v. *Leeds Union* (3), unless that is displaced, and I therefore think we should affirm the decision of the Court below.

KAY, L.J., read the following judgment. A young girl, the child of a widowed mother, was in domestic service in West Ham from July, 1879, to July, 1883. Her mother never resided in West Ham. In 1883 the girl went to live with her mother, and eventually became chargeable to the parish of St. Matthew, Bethnal Green. During only the last two years of her service in the parish of West Ham was the girl over sixteen, being just above fourteen when she first went there. It has been held that the girl acquired a settlement in West Ham. Against this that parish now appeals.

It is contended that while the girl was under sixteen she could only have the settlement and the status of irremoveability of her mother, who never had either in West Ham, and that consequently the girl did not acquire a settlement in West Ham. Such a settlement, it is argued, could only be acquired by three years of residence, each of which years must be a year during, or at least at the end of, which she would have been or become irremoveable.

(1) 31 L. J. (M.C.) 77. (2) 25 Q. B. D. 164.
(3) 4 Q. B. D. 323.

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The question depends upon s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876. That section requires to obtain a settlement (1.) three years' residence, (2.) a peculiar manner and circumstances of residence. The manner and circumstances are thus mentioned: "In such manner and under such circumstances in each of such years as would in accordance with the several statutes in that behalf render" her "irremoveable."

The statutes in that behalf are 9 & 10 Vict. c. 66, 11 & 12 Vict. c. 111, 24 & 25 Vict. c. 55, and 28 & 29 Vict. c. 79, s. 8.

By the first of these Acts five years' residence was necessary to give irremoveability; by the third this was reduced to three years, and by the last to one year.

But the first of these statutes contained a proviso which was made more explicit by the second, and as so altered provided, so far as applicable to the present case, that whenever a widow should have a child having no other settlement than her own, such child should be removeable from any parish from which she would be removeable.

The mother would undoubtedly have been removeable from the parish of West Ham if she had gone there and become chargeable before the girl attained sixteen. Therefore it is said the girl did not become irremoveable before that age because by s. 35 of the Divided Parishes Act, passed in 1876, a child under sixteen must take the settlement of its widowed mother up to that age, and must retain that settlement until it acquires another. Having the mother's settlement up to sixteen, the proviso, it is argued, prevented the girl becoming irremoveable in another parish by a year's residence under that age. Consequently there were not three years of residence in West Ham in each of which this girl was irremoveable, but only two; and it must follow that by her residence there she did not acquire a settlement.

I confess I am considerably impressed by this reasoning, and it is necessary to see whether I am compelled by authority to arrive at some other conclusion.

There are two cases which it is said have decided otherwise. The first is *Reg.* v. *Leeds Union.* (1) In that case an illegitimate

(1) 4 Q. B. D. 323.

child a fortnight old was placed by its mother in the care of strangers who resided in a parish in which the mother did not reside, and the child lived with them there for more than three years. Then they removed to another parish, and a few months afterwards the child became chargeable and was removed to the parish where it had resided more than three years. Although the child for those three years was under the age of seven years its residence was held sufficient to give it a settlement, and the proviso was held not to apply, Cockburn, L.C.J., saying that the proviso in 11 & 12 Vict. c. 111, was enacted "to prevent the dispersing of different members of a family," and that the mother had entirely given up the child. "It was not a suspension, but a virtual abandonment of the 'maternal rights' without any intention to resume them, and that in such circumstances simple residence for the three years was sufficient."

The other case is *Guardians of Mitford and Launditch Union* v. *Guardians of Wayland Union*. (1) There a child lived with her father till she attained sixteen, and shortly after attaining that age became chargeable. He was then residing in and had become irremoveable from a parish in which he had no settlement. It was held that the girl had the same settlement as her father, but that the proviso in 11 & 12 Vict. c. 111, applied, and that as he could not be removed from the parish in which he was residing neither could she.

In *Guardians of Highworth and Swindon Union* v. *Guardians of Westbury-on-Severn Union* (2) the House of Lords held that where a girl had resided with her widowed mother in the parish in which that mother had a settlement, and from which she was irremoveable, for three years partly before and partly after she attained sixteen, the period before she attained sixteen could be reckoned in making up the three years. The point we have to decide did not arise. The residence was irremoveable in each of the three years. The Lord Chancellor says at p. 480: "It is clear, therefore, in this case there was for more than three years a status of irremoveability in each of the three years." The decision, therefore, is of no authority in a case in which during one of those three years the pauper had not acquired that status.

(1) 25 Q. B. D. 164. (2) 14 App. Cas. 465.

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None of these cases decides the exact point raised before us. The question is a new one. It must be determined upon the meaning and intention of the proviso in the 11 & 12 Vict. c. 111. If it was meant to prevent division of families where the members of the family were actually or virtually living together, no case comes within the mischief which was to be provided against when that circumstance does not exist. Does it exist where a girl of thirteen or fourteen has gone into domestic service in another parish different from that in which her parents are settled or are irremoveable? The question seems to me doubtful. However, I am not prepared to depart from the view taken by the other members of the Court, which I understand to be that such a case is not within the mischief aimed at by the proviso, and that such residence for a year will make the girl irremoveable. If so, she was irremoveable at the end of the first year of her service as well as in each of the succeeding years, and this appeal fails.

Appeal dismissed.

Solicitor for appellants: *F. E. Hilleary.*
Solicitor for respondents: *W. T. Howard.*

A. M.

1892
June 22.

ATTORNEY GENERAL *v.* LORD ABERDARE AND OTHERS.

Revenue—Estate Duty—Succession Duty—"Succession" of a value exceeding 10,000*l.*—36 *Geo.* 3, *c.* 52, *s.* 12—*Succession Duty Act*, 1853 (16 *&* 17 *Vict. c.* 51), *ss.* 1, 2, 10, 32—*Customs and Inland Revenue Act*, 1889 (52 *&* 53 *Vict. c.* 7), *s.* 5, *sub-ss.* 1, 4, 5; *s.* 6, *sub-ss.* 1, 2, 4.

By the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 6, sub-s. 1, an estate duty of one per cent. is charged upon any succession upon the death of any person where the value of such succession exceeds 10,000*l.* By sub-s. 4: "The duty imposed by this section is to be in addition to any duties chargeable under the Succession Duty Act, 1853, and s. 21 of the Customs and Inland Revenue Act, 1888, and shall, subject to the provisions of this Act, be assessed and paid in like manner as succession duty, and be subject to the enactments relating to that duty, so far as the same are applicable." By the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 1: "In the construction and for the purposes of this Act, the term 'succession' shall denote any property chargeable with duty under this Act." By s. 10: "There shall be paid in respect of every such succession as aforesaid—where the successor shall be the lineal issue of the predecessor, a duty at the rate of one per cent. (now one and a half per cent.) upon the value thereof. By

s. 32: "The following provisions relating to the assessment and payment of duty on personal estate and the exemption thereof from duty in certain cases, viz., among others, s. 12 of 36 Geo. 3, c. 52, shall be applicable to the personal property comprised in any succession, and to the assessment and payment of duty thereon, as if such personal property was a legacy bequeathed by the predecessor to the successor, and were subject to the said provisions." By 36 Geo. 3, c. 52, s. 12: "The duty payable on a legacy or residue, or part of residue, of any personal estate, given to or for the benefit of, or so that the same shall be enjoyed by, different persons in succession, who shall be chargeable with the duties hereby imposed at one and the same rate, shall be charged upon and paid out of the legacy or residue, or part of residue, so given, as in the case of a legacy to one person."

Under a marriage settlement, upon the death of the settlor, who was the father of the wife, a fund of more than 10,000*l.* became vested in the trustees in trust for the wife for life with remainder to the younger children of the marriage in equal shares absolutely:—

Held, that the effect of sub-s. 4 of s. 6 of the Customs and Inland Revenue Act, 1889, was to incorporate into sub-s. 1 the definition of the term "succession" which is contained in s. 1 of the Succession Duty Act, 1853, viz., "any property chargeable with duty under this Act," and that, therefore, as the persons here entitled in succession, being the lineal issue of the predecessor, were chargeable with succession duty at the same rate under s. 10 of the Succession Duty Act, 1853, and succession duty was in such case made a charge upon the fund by s. 32 of the Succession Duty Act, 1853, and s. 12 of 36 Geo. 3, c. 52, the fund constituted a "succession" of a value exceeding 10,000*l.*, upon which estate duty was payable.

INFORMATION by the Attorney General claiming estate duty under s. 6 of the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7).

The information stated that by an indenture dated September 23, 1861, and made between Isabella Sophia Beadon of the first part, Richard A'Court Beadon of the second part, the Honourable William Leonard Holmes A'Court of the third part, the defendant Henry Austin Baron Aberdare, then Henry Austin Bruce, and certain other persons of the fourth part, being a settlement executed before and in contemplation of a marriage agreed upon between the said William Leonard Holmes A'Court and Isabella Sophia Beadon, the said Richard A'Court Beadon, who was the father of the said Isabella Sophia Beadon, assigned to the said Henry Austin Bruce and such other persons (inter alia) a policy of assurance on his own life in the Equitable Assurance Office for 5000*l.*, and all bonuses and sums of money payable thereunder, in trust for himself, the settlor, until the intended marriage

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should take place, and after the solemnization thereof and his own death, to receive the money payable thereunder and to invest it as therein mentioned, and hold the investments upon trust for his wife Isabella Beadon for life (which trust became inoperative by reason of her predeceasing her husband), and after her death upon the trusts thereinbefore declared concerning other moneys and funds comprised in the settlement, being, in the events which have happened, upon trusts for the benefit of the intended husband and wife during the coverture, and after the determination thereof upon trust for the said Isabella Sophia A'Court, who survived her husband, for life, and after her decease in trust for such of the issue of the said intended marriage to be born during the lives of the said William Leonard Holmes A'Court and Isabella Sophia Beadon, or the life of the survivor of them, or within twenty-one years after the death of such survivor, other than and except an eldest or other son (not being an only child), who should be entitled for the time being to the first estate in tail male or in tail in the Heytesbury and Holmes's family estates, with such provisions for their respective maintenance, education, and advancement, and upon such conditions with such restrictions and in such manner as the said William Leonard Holmes A'Court and Isabella Sophia A'Court should by deed jointly appoint, and in default of such appointment as the survivor should by deed or will appoint, and in default of any such appointment, in trust for all the children or any the child of the said intended marriage, other than and except such eldest son or other son as aforesaid, who being a son or sons should attain the age of twenty-one years, or being daughters or a daughter should attain that age or marry under that age, and if more than one in equal shares, with an ultimate trust in default of issue for the said Isabella Sophia A'Court if she should survive her said husband absolutely, and the said indenture contained a covenant by the said Richard A'Court Beadon for the payment of the said premiums on the said policy.

The said marriage was duly solemnized. The said Isabella Beadon, wife of the said Richard A'Court Beadon, died on October 10, 1885. The said William Leonard Holmes A'Court died on December 16, 1885. The said Richard A'Court Beadon

died on November 30, 1890. There were ten younger children of the said marriage, seven of whom have attained the age of twenty-one years, whilst three are living and infants and unmarried. No appointment in favour of any of the said children has been made under the powers in the said settlement.

Upon the death of the settlor, Richard A'Court Beadon, the defendants as trustees of the settlement received the moneys due under the policy, which amounted with bonuses to 20,075*l.* Estate duty as well as succession duty was claimed on this sum as on a "succession" exceeding 10,000*l.* in value within the meaning of s. 6 of the Customs and Inland Revenue Act, 1889. The defendants admitted their liability to pay succession duty, as Isabella Sophia A'Court and her children, being the lineal issue of Richard A'Court Beadon, were chargeable therewith at the same rate of 1½ per cent. under s. 10 of the Succession Duty Act, 1853, and s. 21 of the Customs and Inland Revenue Act, 1888, and the duty was in such case charged on the fund by s. 12 of 36 Geo. 3, c. 52, which was incorporated into s. 32 of the Succession Duty Act, 1853; but they disputed their liability to pay estate duty. It was admitted that the value of the life interest of Isabella Sophia A'Court in the fund was less than 10,000*l.*

F. V. Hawkins, (with him, *Sir E. Clarke, S.G.*), for the Crown. Estate duty is payable upon the amount of the fund. It is admitted that the life interest of the daughter and the expectant interests of the grandchildren constitute one "succession" for the purposes of succession duty under s. 32 of the Succession Duty Act (1), and s. 12 of 36 Geo. 3, c. 52, and that succession duty is for this reason payable by the defendants "upon and out of" the fund in the same manner as legacy duty is payable by executors "in the case of a legacy to one person." (1) The effect of s. 6 of the Customs and Inland

(1) By the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 5, sub-s. 1: "Where in the case of any person applying for probate or letters of administration granted on or after June 1, 1889, the value of the estate and effects in respect whereof duty is charged on the affidavit exceeds ten thousand pounds, he shall, together with such affidavit, deliver a statement of the value of such estate and effects."

Sub-s. 4: "There shall be charged

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Revenue Act, 1889, is to make estate duty payable in addition to succession duty where, as here, the "succession" for the

and paid on every statement to be delivered in conformity with this section, a duty of one pound for every full sum of one hundred pounds, &c."

Sub-s. 8: "The duties respectively imposed by this section are to be in addition to the stamp duties charged on the affidavit required from persons applying for probate or letters of administration, &c."

By s. 6, sub-s. 1: "Where the value of any succession upon the death of any person dying on or after June 1, 1889, chargeable with duty under the Succession Duty Act, 1853, and the Customs and Inland Revenue Act, 1888, exceeds ten thousand pounds . . . . a separate statement of the value of the succession shall be delivered to the Commissioners of Inland Revenue, together with the account to be delivered under s. 45 of the said Act" (i.e., the Succession Duty Act, 1853).

Sub-s. 2: "There shall be charged and paid on every statement to be delivered in conformity with this section in respect of the value of the succession, a duty of one pound for every full sum of one hundred pounds, &c."

Sub-s. 4: "The duty imposed by this section is to be in addition to any duties chargeable under the Succession Duty Act, 1853, and s. 21 of the Customs and Inland Revenue Act, 1888, and shall, subject to the provisions of this Act, be assessed and paid in like manner as succession duty, and be subject to the enactments relating to that duty so far as the same are applicable."

By the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 1: "In the construction and for the purposes of this Act . . . the term 'succession' shall denote any property chargeable with duty under this Act."

Sect. 2: "Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a 'succession'; and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote the settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived."

By s. 10: "There shall be levied and paid to Her Majesty in respect of every such succession as aforesaid, according to the value thereof, the following duties: (that is to say)—

"Where the successor shall be the lineal issue of the predecessor, a duty at the rate of one pound per centum upon such value."

By the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 21, the duty is in this case increased by one-half per cent.

By s. 32: "The following provi-

purposes of succession duty under s. 32 of the Succession Duty Act, and s. 12 of 36 Geo. 3, c. 52, exceeds 10,000*l.* in value. The definition of "succession" in s. 1 of the Succession Duty Act, "properly chargeable with succession duty," is incorporated into sub-s. 1 of s. 6 of the Customs and Inland Revenue Act, 1889, and, therefore, wherever, upon the death of the predecessor, property worth more than 10,000*l.* becomes chargeable with succession duty, estate duty is payable upon the value of such property.

Bosanquet, Q.C., and *Edward Beaumont*, for the defendants. Estate duty is not payable. Sect. 32 of the Succession Duty Act, and s. 12 of 36 Geo. 3, c. 52, provide for the payment of succession duty out of the capital under the peculiar circumstances of this case; but they do not affect the nature of succession duty, which is essentially a tax on the interest taken by successors. The intention of s. 6 of the Customs and Inland Revenue Act, 1889, must therefore be to impose an additional duty where a successor takes an interest worth more than 10,000*l.* This is not the case here, for neither the interest of the tenant for life nor that of any of the remaindermen is worth 10,000*l.*

[WRIGHT, J. Under s. 5, the liability to estate duty depends upon the value of the "estate" of the testator or intestate person.]

Sir E. Clarke, S.G., in reply. The whole fund is "property chargeable with succession duty," and, therefore, a "succession," as defined in the incorporated 1st section of the Succession Duty Act. The name "estate duty" shews that the intention of the

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sions relating to the assessment and payment of duty on personal estate, and the exemption thereof from duty in certain cases, viz., among others the 12th section of 36 Geo. 3, c. 52, shall be applicable to the personal property comprised in any succession, and to the assessment and payment of duty thereon, as if such personal property were a legacy bequeathed by the predecessor to the successor, and were subject to the said provisions."

By 36 Geo. 3, c. 52, s. 12: "The duty payable on a legacy or residue, or part of residue, of any personal estate, given to or for the benefit of, or so that the same shall be enjoyed by, different persons in succession, who shall be charged with the duties hereby imposed at one and the same rate, shall be charged upon and payable out of the legacy or residue, or part of residue so given, as in the case of a legacy to one person."

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statute is to tax the estate of the predecessor, not the interest taken by a successor.

[WRIGHT, J. Suppose that upon the death of the predecessor three events occur, a devolution to A. under some ancient settlement, a vesting in B. under a power of appointment exercised by the predecessor in his will, and a survivorship to C. as a joint tenant with the predecessor; surely it could not be contended that these three events, if they jointly affected property worth more than 10,000*l.*, were to be regarded as giving rise to one succession for the purposes of estate duty.]

Here the whole fund is the subject of one disposition.

WRIGHT, J. This is an important matter, and if my learned brother and I thought that we could usefully do so, we would take time to consider our decision. There are, however, no authorities, and, as we have been referred in detail to the provisions of the statutes which affect the question, we think that we may give judgment now.

The question turns principally, as it seems to me, on what is the general object of the portion of the Customs and Inland Revenue Act, 1889, which creates the new duty called estate duty. Now there can be no doubt that the intention of s. 5 is to give the new duty whenever the whole estate of a testator exceeds 10,000*l.* without reference to the amount taken by any particular beneficiary. Equally clearly it is the intention of s. 5 that in cases of intestacy the new duty shall be payable whenever the whole estate of the person who dies intestate exceeds 10,000*l.*, and only when this is so. This, to my mind, raises a strong presumption that the intention of s. 6 in dealing with successions is to make the liability to the new duty depend, not on the value of what is taken by any particular successor, but on the value of that which is the subject-matter of the succession, whatever it may be. We have then to consider the effect of the words in sub-s. 1 of s. 6, "where the value of any succession exceeds 10,000*l.*" Now by sub-s. 4, not only is estate duty "to be in addition to any duties chargeable under the Succession Duty Act," but it is "to be assessed and paid in like manner as succession duty," and "to be subject to the enact-

ments relating to that duty, so far as the same are applicable." I think that these words of sub-s. 4 shew that the manner in which a subject-matter of succession is dealt with by the Succession Duty Act for the purposes of succession duty is to be taken into consideration, when it has to be determined whether estate duty is payable in addition on the same subject-matter of succession owing to its value being more than 10,000*l.*; and I think, on the whole, that these words have, as is contended on behalf of the Crown, the effect of incorporating into sub-s. 1 the definition of "succession" which is given in s. 1 of the Succession Duty Act—that is, "property chargeable with succession duty."

Now there is no doubt that here the whole fund of 20,075*l.* is the subject of one account for the purposes of succession duty. The presumption is, therefore, that it is the subject of one account for the purposes of estate duty; and, if the definition of "succession" in s. 1 of the Succession Duty Act is regarded as incorporated into sub-s. 1 of s. 6, it is plain that, as the "property chargeable with succession duty," owing to the death of the predecessor, is here the whole fund of 20,075*l.*, the whole fund, and not the interest in it of any individual successor, is the "succession," the value of which is referred to in the words, "where the value of any succession exceeds 10,000*l.*," in sub-s. 1 of s. 6, and that estate duty is therefore payable by the defendants on the whole fund. I cannot think that sub-s. 1 of s. 6 means that estate duty is to be payable whenever the value of all the property whatsoever which passes upon the death of the predecessor is more than 10,000*l.*, as the counsel for the Crown at first contended. I think "any succession" must mean "any one succession," and that the effect is that estate duty is payable, whenever, as is the case here, the value of any one fund which passes upon the death of the predecessor, as the result of one disposition or of one devolution, exceeds 10,000*l.*

The provision in this subsection for the delivery of a separate statement of the value of the succession for the purposes of estate duty, does not, I think, shew that this succession is intended to be necessarily something different from that of which an account has to be given for the purposes of succession duty. The object

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is that each statement may be separately stamped. There are to be two statements, though the account in each may be the same. I agree with the observation of the Solicitor General that the name of the new duty, estate duty, is itself a reason for holding that in s. 6, as in s. 5, the intention is to impose an additional duty upon large estates which pass in consequence of a death, not an additional property tax upon large benefits which are received by individuals in consequence of a death. Our judgment must, therefore, be for the Crown.

COLLINS, J. I have come to the same conclusion, though my mind has wavered during the argument. I think that the standpoint from which this case is to be considered is that indicated by the Solicitor General, who argued that the new duty imposed by this Act is, as its name imports, essentially an estate duty, and not a property tax; and I was struck by the force of my learned brother's observations that in s. 5, where the Act imposes this new duty which is an estate duty in the case of property passing under a will or upon intestacy, it obviously makes the liability to the new duty depend upon the value of the estate which passes in consequence of the death, without any reference to that of the interest taken by any individual beneficiary.

The present case arises under s. 6 of the Act, a section which deals with successions, and the question is, Is the effect of this section to impose this new duty, which is an estate duty, upon the whole subject-matter of the succession, or upon the special beneficial interest taken by an individual successor? Primâ facie, the former is the right construction, and in this particular case I see no difficulty in adopting it. Sub-s. 1 of s. 6 makes estate duty payable "where the value of any succession exceeds 10,000*l*." We have to determine the meaning of these words. Now, sub-s. 4 of s. 6 enacts that estate duty is to be "in addition to succession duty," is to be "assessed and paid in like manner as succession duty, and is to be subject to the enactments relating to that duty, so far as the same are applicable." Estate duty, therefore, is in this particular case to be assessed and levied in the same manner as succession duty in this par-

ticular case, and is to be subject to the enactments relating to that duty, which are, in this particular case, ss. 1, 2, and 32 of the Succession Duty Act, and s. 12 of 36 Geo. 3, c. 52. This fund, then, of 20,075*l.* has become vested in the defendants, as trustees of a marriage settlement, upon the death of the settlor, who is the father of the wife, in trust for the wife for life, with remainder to the younger children of the marriage in equal shares absolutely. Now the tenant for life and the remaindermen are all "successors," and their separate interests are all separate "successions" within the meaning of s. 2 of the Succession Duty Act; but by s. 32 of that Act, and s. 12 of 36 Geo. 3, c. 52, where the persons entitled in succession are chargeable with the duty at the same rate, which is the case here, as they are respectively the child and the grandchildren of the settlor, the different successions are treated as one aggregate succession, and succession duty is payable once for all upon the whole subject-matter of the succession in the same manner in which legacy duty is payable in the case of a legacy to one person. In *Cuddon* v. *Cuddon* (1), Jessel, M.R., speaking of the liability of the trustees of a marriage settlement under these circumstances, said: "By s. 32 of the Succession Duty Act, 'personal property settled upon different persons in succession is to be treated as if it were a legacy bequeathed by the predecessor to the successor.' If the section is to be taken, as I think it must be, to mean that the duty shall be payable by the same persons in the case of a succession as in the case of a legacy, then the trustees of the settlement are liable to pay it." The trustees have taken this view of their obligation, and have paid, as they were bound to do, succession duty on the whole fund of 20,075*l.* As, then, succession duty is payable on the whole fund of 20,075*l.* under these enactments, estate duty is payable on the whole fund of 20,075*l.* under these enactments as on a succession exceeding 10,000*l.* in value. I should add that if the definition of "succession" in s. 1 of the Succession Duty Act, "property chargeable with duty under this Act," is to be regarded as incorporated into sub-s. 1 of s. 6, it is obvious that, as "the property chargeable with succession duty" is the whole fund of 20,075*l.*, the whole

(1) 4 Ch. D. 583.

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fund constitutes a "succession" of a value exceeding 10,000*l.*, and is consequently chargeable with estate duty, and that I see nothing in the context in subs. 1 of s. 6 to prevent the incorporation of the definition. Our judgment must, therefore, be for the Crown.

Judgment for the Crown.

Solicitor for the Crown: *Solicitor to the Inland Revenue.*
Solicitors for the defendants: *Showbridge & May.*

H. D. W.

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June 22, 23.

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Revenue—Succession Duty—Succession Duty Act, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 20, 38.

Under a marriage settlement a fund was vested in trustees in trust for the wife for life, with remainder to the husband for life, with remainder in default of issue to the wife absolutely. There was no issue of the marriage, the husband predeceased the wife, and upon his death the trustees transferred the fund to her:—

Held, that upon the death of the husband a succession was taken by the wife, in respect of which succession duty was payable on the amount of the fund, less the value of her life interest therein.

INFORMATION by the Attorney General claiming succession duty.

The information stated, that by an indenture dated November 30, 1872, and made between Alexander Clunes Sherriff, of the first part, Alexander Tom Arthur Sherriff (son of the said Alexander Clunes Sherriff) of the second part, Henry Robertson of the third part, Annie Robertson, spinster, an infant (daughter of the said Henry Robertson) of the fourth part, and George William Sherriff, James Alexander Sherriff, William Henry Darby, and John William Dean of the fifth part, reciting that a marriage had been agreed upon between the said Alexander Tom Arthur Sherriff and the said Annie Robertson, and reciting amongst other things that upon the treaty for the said intended marriage it was agreed that the said Henry Robertson should settle upon the trusts and in manner thereinafter expressed a sum of 7000*l.* secured on mortgage as therein mentioned, and the sum of 3000*l.* stock of the Corwen and Bala Railway Com-

pany, and that the said mortgage debt and security had been assigned to the parties thereto of the fifth part as trustees and the said stock transferred into their names, it was, amongst other things, agreed and declared :—

That the trustees or trustee of the now stating indenture should, after the said intended marriage, either retain the said sum of 7000*l.* secured by the said indenture of mortgage and assigned to the said trustees as aforesaid, and the 3000*l.* stock of the Corwen and Bala Railway Company transferred to the said trustees as aforesaid, or should, with the consent in writing of the said Henry Robertson, Alexander Tom Arthur Sherriff, and Annie Robertson during their joint lives, and of the survivors or survivor of them during their, his, or her life, and after the decease of such survivor at the discretion of the trustees or trustee, call in the same and invest the proceeds on such security as therein mentioned.

That the said trustees or trustee should pay the income of the said sums of 7000*l.* invested on mortgage security, and 3000*l.* Corwen and Bala Railway stock, and the trust funds for the time being representing the same, to the said Annie Robertson during her life for her separate use during coverture without power of anticipation, and after her decease should pay the said income to the said Alexander Tom Arthur Sherriff if he should survive her during his life ; provided, that if the said Alexander Tom Arthur Sherriff should either in the lifetime of the said Annie Robertson or after her decease assign or charge the said income or any part thereof or become bankrupt or do or suffer any other act or thing whereby the said income, if payable to him absolutely, or any part thereof, would become vested in any other person, then and in such case the trust thereinbefore declared in favour of the said Alexander Tom Arthur Sherriff should cease as if he were dead.

That the said trustees or trustee should stand possessed of the said sums of 7000*l.* invested on mortgage security and 3000*l.* Corwen and Bala Railway stock, or the trust funds for the time being representing the same respectively and the income thereof, from and after the determination of the trusts declared concerning the said income by the last two preceding articles

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respectively upon certain trusts thereinafter declared for the benefit of the issue of the said intended marriage, with usual powers of appointment and of maintenance and advancement.

That if there should be no issue of the said intended marriage in whom the several trust funds thereby settled should become absolutely vested under the foregoing trusts and powers, then and in such case, and subject to the foregoing trusts and powers, the trustees or trustee should stand possessed of the said sums of 7000*l.* invested on mortgage security and 3000*l.* Corwen and Bala Railway stock, or the trust funds for the time being representing the same respectively upon such trusts as the said Annie Robertson should by her will, whether covert or sole, appoint, and in default of such appointment, and in so far as any appointment shall not extend, in trust for the said Annie Robertson, her executors, administrators, and assigns, if she should survive her now intended coverture, but if she should die during her now intended coverture, then in trust for the person or persons who under the statutes for the distribution of the effects of intestates would, on the decease of the said Annie Robertson, have been entitled thereto if she had died possessed thereof intestate and without having been married, such persons, if more than one, to take as tenants in common in the shares in which the same would have been divisible among them under the same statutes.

The marriage between the said Alexander Tom Arthur Sherriff and Annie Robertson was duly solemnized. The said Alexander Tom Arthur Sherriff died on February 8, 1880, leaving the said Annie Sherriff surviving him. There was no issue of the said marriage. The said Annie Sherriff died on July 24, 1889, having by her will, dated January 19, 1887, appointed the defendant and George Henry Wilson her executors, and they duly proved the same. The said George Henry Wilson died on August 31, 1891.

The said Annie Sherriff on the death of her husband became absolutely entitled to the trust funds representing the said settled sums of 7000*l.* and 3000*l.*, and the said trust funds were accordingly transferred to her by the trustees of the said settlement, and were part of her estate at her death, and the defendant has administered the same accordingly.

The informant claimed a declaration that upon the death of

the said Alexander Tom Arthur Sherriff succession duty became payable on the capital of the trust funds representing the sums of 7000*l.* secured on mortgage and 3000*l.* stock of the Corwen and Bala Railway under the said settlement of November 30, 1872 (less the value at the time of the death of the said Alexander Tom Arthur Sherriff of the life interest of the said Annie Sherriff in the same trust funds under the said settlement), and that the defendant, as executor of the said Annie Sherriff, was personally accountable to Her Majesty for such duty.

Probate duty at 3 per cent., and legacy duty at 3 per cent., had been paid upon the amount of the fund.

Sir E. Clarke, S.G., and *F. Vaughan Hawkins*, for the Crown. Succession duty is payable. The death of her husband was under the settlement the occasion or causa sine quâ non of the right of Mrs. Sherriff to the absolute property in the fund, in which till then she had only a life interest: *Attorney General* v. *Gell.* (1) Upon his death, therefore, she took a succession under s. 2 of the Succession Duty Act, and became "entitled in possession" under s. 20. (2) Upon his death, therefore, succession duty was

(1) 3 H. & C. 615.

(2) By the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 2: "Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally, or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of such disposition or devolution a 'succession'; and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote the settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived."

By s. 20: "The duty imposed by this Act shall be paid at the time when the successor, or any person in his right or on his behalf, shall become entitled in possession to his succession, or to the receipt of the income and profits thereof; except that if there be any prior charge, estate, or interest, not created by the successor himself upon or in the succession, by reason whereof the successor shall not be presently entitled to the full enjoyment and value thereof, the duty in respect of the increased value accruing upon the determination of such charge, estate, or interest, shall

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payable on the amount of the fund less the value of her life interest under s. 38.

Crackanthorpe, Q.C., and *Ingle Joyce*, for the defendant. Succession duty is not payable. It may be conceded that succession duty is payable by the defendant, if succession duty was payable under s. 20 of the Succession Duty Act upon the husband's death. But it is contended that there was no succession to the wife on her husband's death, as the effect of the settlement was to make her absolute owner of the fund, subject to contingencies which did not occur, among others, that of her husband surviving her. It is further contended that if there was a succession to the wife on her husband's death, as she had herself a life interest in the fund, she could not become "entitled in possession" to such succession under s. 20 till her own death. Where property is settled on A. for life, with remainder to B. for life, with remainder to C. absolutely, it is obvious that upon the death of B. during the lifetime of A. there is no succession to C., and that there can be none till A. dies. Here the wife is both A. and C. If this is so, the payment of legacy duty at 3 per cent. exempts the estate from succession duty which would be chargeable here at 1 per cent.: *In re Chapman's Trusts* (1); *Attorney General* v. *Littledale* (2); and the payment of probate duty has the same effect: *In re Haygarth's Trusts.* (3)

F. Vaughan Hawkins, in reply. Under the settlement upon the death of her husband, all the other trusts being, in the events which had happened, exhausted, the wife became the sole cestui que trust, entitled as such to claim the fund from the trustees. Upon his death, therefore, the wife became "by reason of a disposition of property beneficially entitled to property" under s. 2, and "entitled in possession" to the succession under s. 20.

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if not previously paid, compounded for, or commuted, be paid at the time of such determination, &c."

By s. 38: "Where any successor upon taking a succession shall be bound to relinquish or be deprived of any other property, the commissioners shall upon the computation of the assessable value of his succession, make such allowance to him as may be just in respect of the value of such property."

(1) 2 H. & M. 447.

(2) Law Rep. 5 Ex. 275; 5 H. L. C. 290.

(3) 22 Ch. D. 545.

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WRIGHT, J. Under this settlement, during the lifetime of her husband, Mrs. Sherriff had only an interest in this fund for her own life; should her husband predecease her, she was to be absolutely entitled to the fund. Her husband did predecease her, and in consequence of his death Mrs. Sherriff became entitled to require the trustees of the settlement to transfer the fund to her. Under the Succession Duty Act it is clearly not necessary that a succession shall be by way of a person taking the estate of a person who dies; it is enough if either a prior charge is removed under s. 20, which is not the case here, or if by reason of the death a new or greater interest accrues in possession. I think that the difference between a life interest and an interest which for all practical purposes amounts to an absolute property in a fund is a succession within the meaning of the words of s. 20: "The duty imposed by this Act shall be paid at the time when the successor shall become entitled in possession to his succession," and that succession duty was therefore payable upon Mr. Sherriff's death. This being so, it is, as I understand, conceded that our judgment must be for the Crown.

COLLINS, J. I am of the same opinion. It is clear that upon the death of her husband Mrs. Sherriff became "beneficially entitled to property by reason of a disposition of property" within the meaning of s. 2 of the Succession Duty Act. Under the settlement Mrs. Sherriff was entitled to the income of the fund during her life; her husband, if he survived her, was entitled to the income of the fund during his life; and Mrs. Sherriff, should her husband predecease her, was entitled to the fund absolutely. Her husband's death during Mrs. Sherriff's lifetime destroyed the life estate which might have intervened between her life estate and her right to the fund absolutely. The settlement is therefore a disposition as a result of which upon the death of her husband Mrs. Sherriff acquired a beneficial interest in the fund which but for that event she would not have acquired. It is said that, as Mrs. Sherriff's life estate under the settlement did not determine till her own death, she took nothing, as a result of the disposition, upon the death of her husband. But after she had acquired a right to the fund

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Collins, J.

absolutely, I do not think that her life estate had any longer any real existence. Where a fund is vested in the trustees of a marriage settlement, and, in the events which have happened, no trusts for the benefit of the children of the marriage any longer subsist, and, upon the death of the husband whose life estate might have intervened, the wife, who has both the life estate and the absolute property in the fund, becomes the sole cestui que trust, she has, in my opinion, a right arising upon the death and by reason of the disposition, then and there to require the trustees, and if necessary to compel them by the aid of the Court, to transfer to her the absolute property in the fund. Here the trustees voluntarily transferred the absolute property in the fund to Mrs. Sherriff. Under these circumstances I am of opinion that the case falls within the very words of s. 2, and that there was therefore a succession by Mrs. Sherriff to the absolute property in this fund upon the death of her husband. Our judgment must, therefore, be for the Crown.

Judgment for the Crown.

Solicitor for the Crown: *Solicitor to the Inland Revenue.*

Solicitors for the defendant: *Meredith, Roberts, & Mills, for Birch, Cullimore, & Douglas, Chester.*

H. D. W.

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1892

Aug. 3.

[IN THE COURT OF APPEAL.]

THE ENGLISH AND SCOTTISH MERCANTILE INVESTMENT COMPANY, LIMITED *v.* BRUNTON.

Mortgage—Assignment of Chose in Action—Prior Charges on Debt Assigned—Constructive Notice—Company—Debenture.

A limited company issued debentures charging all its property both present and future, and containing a condition that the company should not be at liberty to create any mortgage or charge in priority to the debentures. Subsequently the company obtained a loan from the respondents on the security of an assignment to them of its interest in moneys due from an insurance company. When the loan and assignment were effected the respondents' solicitor, who negotiated the matter for them, knew that debentures had been issued, but did not know in what form they were issued, and having been misled by the managing director of the company into believing that there was nothing in the debentures to affect his client's security, he did not require to

see the form. The respondents gave notice of the assignment to the insurance company, and subsequently the debenture-holders gave notice to the insurance company of the prior charge created by the debentures. There are three forms in which debentures are usually issued: In two of them the debenture does not, and in the third it does, restrict the company from creating any charge upon its property which shall have priority over the charge created by the debenture:—

Held, affirming the judgment of Charles, J., that the respondents were not affected with constructive notice of the restrictive clause in the debentures, and therefore that the assignment gave them a charge upon the insurance moneys in priority to the debenture-holders.

APPEAL from a judgment of Charles, J. ([1892] 2 Q. B. 1) on an interpleader issue.

The facts proved in evidence, or admitted, at the trial, and the learned judge's findings thereon, are fully set forth in his judgment, and for the purposes of this report may be stated as follows:—

The Electrical Engineering Corporation, Limited, was registered in January, 1890, and by their memorandum and articles of association had power to borrow on any terms and conditions any sum or sums of money, and to mortgage and charge their undertaking, and all or any part of their real or personal property, present or future, and to issue debentures and debenture stock.

In pursuance of their powers the company, prior to February 26, 1891, issued 200 "first mortgage debentures" of 100*l.* each. In the form of debenture issued the company charged with the payment of the sum of 100*l.*, and interest as specified, its undertaking and all its property whatsoever and wheresoever, both present and future, and one of the conditions was:—

"This debenture is one of a series of 200 debentures issued, or about to be issued, by the Corporation. The debentures of the said series are all to rank pari passu as a first charge on the property hereby charged, without any preference or priority one over another; and the charge hereby created is to be a floating security, but so that the Corporation is not to be at liberty to create any mortgage or charge in priority to the said debentures."

Early in 1891, further money being required for the purposes of the undertaking, the company desired to borrow money on

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the security of certain insurance moneys, which were then coming due to them from the Sun Fire Office, upon a policy of insurance on premises of the company at West Drayton, on which there had recently been a fire. On February 19, 1891, the company's solicitors communicated with the plaintiffs' manager with the view of obtaining a loan from them. After some negotiations the plaintiffs instructed Mr. Paine to act as their solicitor in carrying out the loan, which was to be of 1900*l.* (afterwards reduced to 1400*l.*) for three months, with interest at the rate of 20 per cent., and was to be secured by a charge on the Electrical Company's claim against the Sun Fire Office. On February 25 Mr. Paine had an interview with Mr. Slatter, who was the managing director of the Electrical Company, and others. Prior to that interview Mr. Paine had received a letter written by the Secretary of the Sun Fire Office to the plaintiffs, in which the secretary stated: "We have not received notice of any charge upon the company's money, nor do we know of any circumstances which will prevent an assignment of the amount due, or of any part thereof, being made." At that interview a letter from Mr. Slatter to the Electrical Company's solicitors was read, in which Mr. Slatter stated that the subscribed capital of the company was nearly 56,000*l.*, "and of the debenture issue of 20,000*l.*, 14,500*l.* are placed, and the balance is held as security for a loan of 5000*l.*" Mr. Paine, on reading the letter, asked whether the debentures were secured by any trust deed which might cover the insurance to be assigned. Mr. Slatter replied that they were not. "Nothing whatever," said Mr. Paine, in his evidence, "was said conveying to me in any way that there was anything in the form of debenture which could interfere with the security. I am positive no form of debenture was produced."

Evidence was given that a debenture might, according to present usage, be in one of three forms:—First, it might simply be an acknowledgment of debt under seal; secondly—and this is the more common form—it might be an instrument not only acknowledging the debt, but charging the property of the company issuing it with repayment; thirdly, it might be an instrument acknowledging the debt, charging the property of

the company with repayment, and further restricting the company from giving any prior charge. Mr. Paine had never, in fact, seen a debenture in the third form with the restrictive clause, and stated that he had no suspicion, after the interview of February 25, that the plaintiffs' security could be interfered with; all he knew was that debentures existed. He did not require to see the form of debenture issued by the company, and made no further inquiry into its contents. A deed, made between the Electrical Company as mortgagors and the plaintiffs as mortgagees, was shortly afterwards executed, assigning to the plaintiffs the insurances effected with the Sun Fire Office, and all moneys to become payable thereunder, by way of security for the repayment of the 1400*l.* advanced by the plaintiffs, with interest. This deed was delivered to Mr. Paine on February 26, 1891, and notice of it was duly given to the Sun Fire Office on the following day.

In April the company went into voluntary liquidation. On June 15, notice on behalf of the debenture-holders, who had previously commenced an action against the company, was given to the Sun Fire Office, and to the plaintiffs, that the debenture-holders claimed the insurance moneys in priority to the plaintiffs. Shortly afterwards the plaintiffs commenced an action against the Sun Fire Office in respect of the insurance moneys. The Sun Fire Office interpleaded, and this issue was directed to try the right, as between the plaintiffs and the defendant, representing the debenture-holders, to the sum of 1834*l.*, or some part thereof, which had been paid into Court by the Sun Fire Office to abide the event. The plaintiffs claimed so much of this amount as would satisfy their claim to 1400*l.* and interest, under the mortgage deed, and the defendant claimed the whole fund in Court for the debenture-holders.

Charles, J., gave judgment for the plaintiffs.

The defendant appealed.

Rigby, Q.C. (*Cohen, Q.C.*, and *Le Fanu*, with him), for the appellant. The respondents, when they took the mortgage of the insurance moneys payable by the Sun Fire Office, had constructive notice of the contents of the debentures issued by the

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Electrical Engineering Corporation, Limited. The respondents' solicitor made inquiry, and learnt that debentures had been issued. It is now well known that debentures issued by a company in all reasonable probability create a charge upon the property of the company. Charles, J., found as a fact that the solicitor must have known that the debentures created a charge, although he thought they only constituted a floating security on the property, present or future, of the undertaking. The moment it is established that there were facts which put the lender on inquiry he is fixed with constructive notice. When once he has notice that a document, or a series of documents, affects in all reasonable probability the property upon the security of which he proposes to lend his money, he is bound by everything, however unusual, in that document or series of documents. This comes within the first class of cases in which constructive notice has been established, as stated by Wigram, V.C., in *Jones* v. *Smith* (1), namely, "cases in which the party charged has had actual notice that the property in dispute was in fact charged, encumbered, or in some way affected, and the Court has thereupon bound him with constructive notice of facts and instruments, to a knowledge of which he would have been led by an inquiry after the charge, encumbrance, or other circumstance affecting the property of which he had actual notice." Notice of anything affecting the property itself, not the title merely of the purchaser or mortgagee, is sufficient to bind him to make inquiry. In *Daniels* v. *Davidson* (2) the mere fact that there was a tenant in possession was held sufficient to bind the purchaser of an estate to inquire upon what terms the tenant was in possession. Even when there is an express representation by the vendor or lessor that there are no restrictive covenants in a deed forming part of the chain of title, the purchaser or lessor, having notice of that deed, is bound by the contents of it: *Patman* v. *Harland*. (3) A document which in all reasonable probability affects the property is a document which "must" affect it, or which "necessarily" affects it within the meaning of the expressions used by Wigram, V.C., and Lord Lyndhurst in *Jones* v. *Smith*. (4) The test is what a reasonable

(1) 1 Hare, 43.
(2) 16 Ves. 249.
(3) 17 Ch. D. 353.
(4) 1 Hare, 43; 1 Ph. 244.

man under all the circumstances ought to be taken to have known: *Allen* v. *Seckham* (1), judgment of James, L.J., at p. 794; *Morland* v. *Cook* (2); *Montefiore* v. *Browne.* (3) Here the lender knew that the company had power to create debentures, and that the power had been exercised. He knew also that debentures of the first class were exceptional, and that in the great majority of cases debentures create a charge upon the property. Debentures, primâ facie, import such a charge: *In re Hansard Publishing Union, Limited.* (4) If the lender had constructive notice of the debentures, any representation that they did not affect his security would make no difference.

Sir Horace Davey, Q.C., and *R. T. Reid, Q.C.* (*Tyrrell Paine*, and *Sargant*, with them), for the respondents. It is submitted that no case of constructive notice was made out against the respondents. The rules which have been laid down in the authorities with respect to constructive notice where the title to land is in question do not govern this case. A purchaser of land is by the general law bound to examine the title for forty or fifty years back. If he has notice of a deed which affects the title, and chooses to make no further inquiry, but to rely upon a representation that it does not affect the particular transaction with himself, then he has not examined the title, and has therefore broken the rule. The test of constructive notice contended for on behalf of the appellant is not laid down by any judge who has dealt with the question. The true test is that stated by Lord Lyndhurst in *Jones* v. *Smith.* (5) If a person has notice of a deed, which from the nature of it *must* affect the property he is about to purchase, or upon which he is about to advance money, he has notice of the contents of that deed; but when he has notice of a deed which does not necessarily affect the property, and is told that it does not affect it, and he acts fairly in the transaction, and believes the representation, he is not fixed with notice of the contents of the deed. Jessel, M.R., in *Patman* v. *Harland* (6) applied the same test. Dealing with other subject-matter than land, a person to whom a debt has been

(1) 11 Ch. D. 790.
(2) Law Rep. 6 Eq. 252.
(3) 7 H. L. C. 241.
(4) 8 Times L. R. 281.
(5) 1 Ph. 244.
(6) 17 Ch. D. 353.

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assigned is not bound to investigate the right to assign. It is conceded that the assignee, if he has notice that the debt is due to some person other than the assignor, is bound by that notice; but in the present case all that the respondents' solicitor knew was that debentures had been issued which might be in any one of the three forms stated in the evidence, and he was, in effect, told that the debentures did not contain anything which could affect their security. In *Ware* v. *Lord Egmont* (1) Lord Cranworth said: "The question, where it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained, the knowledge in question; but whether the not obtaining it was an act of gross or culpable negligence." That rule was also adopted in *Montefiore* v. *Browne*. (2) In dealing with real property, a person is not affected with notice of any deed or instrument not disclosed in the abstract of title. If he knows of the existence of a deed which is not disclosed by the abstract, he has not knowledge of a deed which affects title, and he would not be guilty of gross or culpable negligence in not making further inquiry. In dealing with choses in equity the question is whether a man has such knowledge, actual or constructive, of the inability of the person with whom he is contracting to give him what he agreed to buy as to bind him to make further inquiry. As Lord Lyndhurst pointed out in *Jones* v. *Smith* (3), want of prudence in not making inquiry is not of itself sufficient to fix the buyer with notice, if the deed or instrument was one which might, or might not, affect the property. The same principle was applied in *Ware* v. *Lord Egmont* (1); *Montefiore* v. *Browne* (2); see also *Cathay* v. *Sydenham*. (4) In *Agra Bank, Limited* v. *Barry* (5) Lord Selborne (at p. 157) points out that the duty of a purchaser or mortgagee to investigate title and make inquiry into deeds "is merely the course which a man dealing bonâ fide in the proper and usual manner for his own interest ought, by himself or his solicitor, to follow with a view to his own title and his own security. If he does not follow

(1) 4 De G. M. & G. 473.
(2) 7 H. L. C. 241.
(3) 1 Ph. 244.
(4) 2 Bro. C. C. 391.
(5) Law Rep. 7 H. L. 135.

that course, the omission of it may be a thing requiring to be accounted for or explained. It may be evidence, if it is not explained, of a design, inconsistent with bonâ fide dealing, to avoid knowledge of the true state of the title." Here there is no evidence of gross or culpable negligence, or of any negligence, on the part of the respondents or their solicitor. There was an honest attempt by the solicitor to find out whether the debentures did create a charge upon the property which affected the respondents' security, and an answer was given by the card which misled him. It would be carrying the doctrine of constructive notice far beyond any of the authorities to say that the respondent was bound by the contents of the debentures.

[They also referred to *Dearle* v. *Hall.* (1)]

Le Fanu, in reply, referred to *Gibson* v. *Ingo.* (2)

LORD ESHER, M.R. In this case the question is whether the plaintiffs are entitled to the full benefit of the mortgage which they have taken. At the time they took it, through the managing director of the Electrical Engineering Corporation, Limited, there were in existence debentures issued by that company, and there were things stated in those debentures which, if the plaintiffs had known, would have prevented them in equity from saying that their mortgage could be enforced in priority to the debentures. If they had known what was in the debentures they would, in equity, have taken the mortgage with notice of prior charges on the subject-matter of it. It is admitted that the plaintiffs did not in fact know that there was that in the debentures which would prevent them, in equity, from having the full benefit of the mortgage which they took; but it is said that they had what in equity is termed "constructive notice" of what was in the debentures. The doctrine of constructive notice is wholly equitable; it is not known to the common law. There is an inference of fact known to common lawyers which comes somewhat near to it. When a man has statements made to him, or has knowledge of facts, which do not expressly tell him of something which is against him, and he abstains from making further inquiry because he knows what the result would

(1) 3 Russ. 18. (2) 6 Hare, 112.

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be—or, as the phrase is, he "wilfully shuts his eyes"—then judges are in the habit of telling juries that they may infer that he did know what was against him. It is an inference of fact drawn because you cannot look into a man's mind, but you can infer from his conduct whether he is speaking truly or not when he says that he did not know of particular facts. There is no question of constructive notice or constructive knowledge involved in that inference; it is actual knowledge which is inferred. Constructive notice or knowledge, as I have said, is an equitable doctrine wholly; it is a doctrine not known to the common law, but it must now be dealt with and acknowledged by the Courts which administer the common law. It is, therefore, necessary for us to see how far the doctrine extends and is to be carried out, and to consider its nature and limits as laid down by the judges who invented and have applied it. Of late years, after the doctrine had been invented and put into form, the Chancery judges saw that it was being carried much farther than had been intended, and they declined to carry it further. In a series of cases Lords Cottenham, Lyndhurst, and Cranworth, Lord Justice Turner, and the late Master of the Rolls, Sir George Jessel, have said that the doctrine ought not to be extended one bit farther; all the judges seem to have agreed upon that. In *Allen* v. *Seckham* (1) I pointed out that the doctrine is a dangerous one. It is contrary to the truth. It is wholly founded on the assumption that a man does not know the facts; and yet it is said that constructively he does know them. Now, what is the case here? We have not to deal with any question of constructive notice of a deed which affects the title to real property. It is, therefore, not necessary to say how the doctrine should be applied to such a case. We have to apply it to the case of a mortgage of a debt given by a company under powers contained in their articles of association, and who also had a right by their constitution to issue debentures. The mortgagees knew that the company had power to issue debentures, and that they had in fact issued some, but that was all they did know. Under those circumstances their solicitor asked a question of the managing director of the company, with whom he was negotiating about

(1) 11 Ch. D. 790.

taking the mortgage. It is clear to my mind that what he wanted to know, and what he was really asking, was whether there was anything in the debentures which had been issued to interfere with the validity of the mortgage he proposed to take from the company. It is equally clear to my mind that the person of whom he asked the question knew that was what he wanted to know; but answered so as to deceive him. The managing director wanted to effect the mortgage for his company, and he gave an answer which put the mortgagees' solicitor off further inquiry, and led him to believe that there was nothing in the debentures which would affect the mortgage. Now, we have to apply to these facts the doctrine of constructive notice or knowledge, as formerly enunciated by Courts of equity; and we are not to carry it beyond its true and fair meaning as laid down by those who formulated it. I think the doctrine has been accurately deduced from the various cases, and is accurately stated, in the notes to *Le Neve* v. *Le Neve* (1):—"Although, as we have already seen, where a party has notice of a deed which, from the nature of it, must affect the property, or is told at the time that it does affect it, he is considered to have notice of the contents of that deed and of all other deeds to which it refers; nevertheless, where a party has notice of a deed which does not necessarily affect the property, and is told that in fact it does not affect it, but relates to some other property, and such party acts fairly in the transaction, believing the representation to be true, he will not be fixed with notice of the contents of the instrument." Now that is the doctrine formulated in equity: It is not to be carried farther; it is to be construed according to its true meaning, and not to be added to or diminished. What is the true meaning of "must affect the property," as distinguished from "does not necessarily affect the property"? The expressions are not mathematical terms; they must be treated according to their meaning as a legal statement of principle. If it would be wholly unreasonable to suppose that the instrument in question did not affect the property, then it "must affect" it within the meaning of the enunciation; but if it be an instrument such as may or may not affect the property—if any reasonable

(1) 2 Tu. L. C. 6th ed. p. 26, at p. 56.

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man might say, "it is just as likely not to affect the property as to affect it"—then it "does not necessarily" affect it within the meaning of the enunciation. That seems to have been the view taken by Lord Lyndhurst in *Jones* v. *Smith*. (1) Again, in *Patman* v. *Harland* (2), Sir George Jessel, M.R., dealt with the proposition, and pointed out the application of it, thus: "Constructive notice of a deed is constructive notice of its contents, subject to what I am going to say presently. . . . When you know of a deed it is no answer to be told that it does not prejudicially affect the title, as if it does affect the title you are bound by its contents." There he is talking of being told of a deed which does necessarily affect the property; but he goes on: "There is a class of cases, of which I think *Jones* v. *Smith* (3) is the most notorious, where the purchaser was told of a deed which might or might not affect the title, and was told at the same time that it did not affect the title. Supposing you are buying land of a married man, as in *Jones* v. *Smith* (3), and you are told at the same time that there is a marriage settlement, but the deed does not affect the land in question, you have no constructive notice of its contents, because although you know there is a settlement you are told it does not affect the land. If every marriage settlement necessarily affected all a man's land, then you would have constructive notice; but, as a settlement may not relate to his land at all, or only to some other portions of it, the mere fact of your having heard of a settlement does not give you constructive notice of its contents, if you are told at the same time it does not affect the land. I take it, under the modern practice, you are not bound to inquire, because the abstract furnished you is an abstract of every document affecting the land, and although you have been told that the man made a marriage settlement, you are not entitled to assume that the solicitor suppressed improperly the deed of settlement. I take it, if you ask for it, he might say "it has nothing to do with you." But that line of cases has no bearing at all on a case where you know the deed does affect the land, and the question as to the extent to which it does affect the land is to be ascer-

(1) 1 Ph. 244, at pp. 253, 254. (2) 17 Ch. D. 353.
(3) 1 Hare, 43; 1 Ph. 244.

tained only by looking at the deed itself. Therefore you have no right to rely on the statement of somebody else that the deed which you can look at does not contain something which it does in fact contain." The distinction which the Master of the Rolls draws is clearly between deeds which, in the sense I have stated, obviously must affect the property, and deeds which may or may not, in the sense I have stated, affect it. If the case is brought within the first category, and a person is told that the deed does not affect the property, he must look at the deed, and if he does not look at it, he will be taken to have had constructive notice of its contents. If the case is brought within the second category, and the person is told that the deed does not affect the property, he may take that statement and cannot be held to have had constructive notice of its contents. That reduces the question in the present case to this: Were the debentures issued by such a company as this—a company which had the power of issuing debentures, and had also the power of mortgaging its property—instruments of such a nature as might or might not affect the transaction with respect to the mortgage which was given. As I have said, I am not dealing with any question of the title to land; the question here, in my opinion, is, were the debentures such as would necessarily affect the plaintiffs' title to the mortgage, or were they such as might or might not affect it? We were told that debentures which would not affect a subsequent mortgage of the company's property at all were exceptional; but I do not find that in the evidence. There are certainly a class of debentures issued by companies which would not affect the mortgage at all. The first class of debentures stated in the evidence given in the Court below would not; those in the second class would not affect the title to this mortgage, and those in the third class are the only ones which would so affect this title. I, therefore, think that Charles, J., was right in saying that the notice which the plaintiffs had was only notice of documents which might or might not affect their title to the mortgage. I have a strong opinion that, even if the false statement that the debentures did not affect the plaintiffs' title to the mortgage had never been made, the doctrine of constructive notice would not have applied. It is

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not, however, necessary to decide that question now; and I do not decide it. Here, these debentures being such as might or might not affect the plaintiffs' title to the mortgage, their solicitor asked if they did so affect it, and was told they did not. Therefore, within the very terms of the proposition laid down by Lord Lyndhurst, constructive notice of the contents of the debentures cannot be imposed in equity upon the plaintiffs. This appeal, therefore, fails.

BOWEN, L.J. I am of the same opinion. In this case the plaintiffs took a mortgage of the personal property of the company, and the question is, how far their claim under the mortgage is to be prejudiced by the existence of debentures of which they had information of a partial and imperfect, and possibly of a misleading kind? The debentures issued by the company in reality contained a clause that "the debentures of the said series are to rank pari passu as a first charge on the property hereby charged, without any preference or priority one over another, and the charge hereby created is to be a floating security, but so that the corporation is not to be at liberty to create any mortgage or charge in priority to the said debentures." The last paragraph is one which is certainly to be found in some debentures of the present day; but it is a form which is by no means the most common, and it is a form of the existence of which the mortgagees' solicitor was himself ignorant at the time he was negotiating for the granting of the mortgage. It seems that there are three usual forms of debentures, and they are set out in the judgment of Charles, J. The first is a simple acknowledgment, under seal, of the debt; the second, an instrument acknowledging the debt, and charging the property of the company with repayment; and the third, an instrument acknowledging the debt, charging the property of the company with repayment, and further restricting the company from giving any prior charge. In the first class of these forms there is, of course, nothing to charge the property of the company at all. Of late years, however, companies have included in their debentures something which imports a charge upon their property. That is the second form, and it has become a very common form of

debenture. The third is the particular form in which the debentures in the present case were issued. Now the mortgagees' solicitor, into whose knowledge we have to inquire, did not know in the first place in which form the debentures of the company were issued. He knew that they had issued debentures, but he did not know that they were debentures which charged the property of the company, though I think he must be taken to have known that there were debentures which might charge the property of the company, because he must have known that the second form of debenture was commonly used. He did not know there was anything in the debentures which could prejudice his clients' security. If they were debentures in the first or second of the forms, they would not prejudice the security, and he was ignorant altogether of the existence of the third form. He made inquiry of the managing director whether the debentures were secured by any trust deed which might cover the insurance to be assigned. Not knowing of the existence of the third form of debenture, he couched his inquiry, according to his limited knowledge and according to his experience, in a manner which, taken by the card, asked the wrong question, and he was answered by the card. He put his question honestly, intending to ask whether there was anything outstanding which might or did affect the security. He was answered in a way which, treating the question as asked from that point of view, gave him to understand that there was nothing outstanding which could affect the security. Now, I entirely agree with the Master of the Rolls, and with the authorities to which he referred, that the doctrine of constructive notice ought not to be extended, and I am glad to think that my brother Kay takes the same view. The law which has been laid down with respect to a special class of subject-matter—namely, documents forming part of the title to land, or which affect landed estate—cannot be taken from a better source than the language of Lord Lyndhurst, in *Jones* v. *Smith* (1), which is really the same in effect as the language of Sir George Jessel, M.R., in *Patman* v. *Harland*. (2) "The question," says Lord Lyndhurst, "therefore resolves itself into this—whether, when a party is informed of the existence of an

(1) 1 Ph. 244, at pp. 253, 254. (2) 17 Ch. D. 353.

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instrument which may, but which does not necessarily, affect the property he is about to purchase, or upon which he is about to advance money, and it is at the same time stated that the instrument does not affect that property, but relates to some other property, whether, if he acts fairly and honestly, and believes that statement to be true, but it turns out in the result that he is misled, and that the instrument does relate to the property, he is under such circumstances to be fixed with notice of the contents of the instrument?" He then proceeds to state the principle of law: "Undoubtedly where a party has notice of a deed, which from the nature of it must affect the property, or is told at the time that it does affect it, he is considered to have notice of the contents of that deed, and of all other deeds to which it refers." That is an antithesis upon which a second antithesis follows. He is dealing with documents which affect landed property, and I cannot help thinking, though it is perhaps unnecessary to decide it, that it may be necessary to make his statement of the law more precisely applicable to the subject-matter with which he is dealing. The second antithesis is: "But where a party has notice of a deed which does not necessarily—which may or may not—affect the property, and is told that in fact it does not affect it, but relates to some other property, and the party acts fairly in the transaction, and believes the representation to be true, there is no decision which goes the length of saying that, if he is misled, he is fixed with notice of the instrument." Having regard to the peculiar law relating to land, and to the difficulties which arise in dealing with it, it is clear, in the very words of Lord Lyndhurst, that where a party has notice of a deed which from the nature of it must affect *the property*, he is considered to have notice of the deed; but when you pass from landed property to choses in action, it is at least well worthy of consideration whether the true expression ought not to be, "where a party has notice of a deed which from the nature of it must affect *the security, or the title to the right*, which he is claiming, he is considered to have notice of the deed." If that be the true expression with respect to the subject-matter with which we have to deal, this case becomes clear, because the debentures would not from their nature necessarily affect the

plaintiffs' security or the title to the right which they claim. But, whether that be so or not, take the second branch of Lord Lyndhurst's proposition—"where a party has notice of a deed which does not necessarily, which may or may not, affect the property," &c.—and apply it to the facts of the present case. I will assume, in favour of Mr. Rigby's argument, that when you are dealing with questions of the security for money, or of choses in action, the term "necessarily" may mean only to imply such a reasonable probability as would induce a reasonably prudent man to act upon it. I will assume that the deed with which Lord Lyndhurst is dealing means a deed which a prudent man would honestly and reasonably think might or might not affect the property, and that it need only satisfy that condition in order to make the second branch of the proposition applicable. But Lord Lyndhurst does not lay down as law merely that, where a person has notice of the existence of such a deed, he is not fixed with notice of its contents. He adds the qualification, "and is told that in fact it does not affect it, but relates to some other property, and the party acts fairly in the transaction, and believes the representation to be true." Again, I do not feel convinced that, having regard to the class of property which is the subject-matter of this case, Lord Lyndhurst would necessarily have said that a person could only escape from being fixed with constructive notice if he was told that the deed did not affect his right. I think it possible that he might escape if, in respect of a deed or debenture such as is in question here, he did not know or honestly think, and it was reasonable that he should not know or honestly think, that the instrument was one which must affect his right. But it is not necessary to decide that point, and I assume that the doctrine laid down by Lord Lyndhurst is to be applied in its entirety to this case. There are two questions: first, whether the plaintiffs' solicitor had notice of documents which might or might not affect the property of the company; and secondly, whether he was told that in fact they did not affect it, and acted fairly in the transaction, and believed the representation to be true. That the debentures were instruments which might or might not affect the property I think he must have known; but certainly he did not know that they affected

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his clients' security, or necessarily or probably would do so. The answer given to his question beyond all doubt convinced him, and reasonably convinced him, that there was no charge upon the company's property which could affect the security. If that be so, Lord Lyndhurst's definition is fulfilled, and the appeal ought to fail. The case is stronger still against the appellant if the other view of the law, which I have indicated, be taken; but, whichever view be taken, it is certain that plaintiffs' solicitor was misled as to whether the right created by the company's debentures was one which would affect the property mortgaged to the plaintiffs.

For these reasons, I am of opinion that the equity doctrine of constructive notice does not apply in this case, and that the appeal should be dismissed.

KAY, L.J. I agree in the result of the judgment which has been delivered by the Master of the Rolls and Bowen, L.J. The subject-matter of the mortgage in this case was a large sum of money owing by the Sun Fire Office to the Electrical Engineering Corporation. The latter company wanted to mortgage this debt, and the plaintiffs, who were willing to become the mortgagees, took the precaution of asking whether the Sun Fire Office had had notice of any charge upon it. No such notice had been given; but the plaintiffs discovered that the Electrical Company had issued debentures under powers contained in their articles of association. Now, what sort of inquiry were the mortgagees put upon when they got notice that the company had issued debentures? Wigram, V.C., in *Jones* v. *Smith* (1), defines, in a manner which has since been accepted as law, the cases in which constructive notice is established against mortgagees. "The cases," he said, "in which constructive notice has been established resolve themselves into two classes; first, cases in which the party charged has had actual notice that the property in dispute was in fact charged, encumbered, or in some way affected, and the Court has thereupon bound him with constructive notice of facts and instruments, to a knowledge of which he would have been led by an inquiry after the charge, encumbrance, or other

(1) 1 Hare, 43.

circumstance affecting this property, of which he had actual notice; and secondly, cases in which the Court has been satisfied from the evidence before it that the party charged had designedly abstained from inquiry for the very purpose of avoiding notice." Now it is admitted that the case before us is not brought within the second branch of the proposition. It is not alleged here that the mortgagees abstained from making inquiry for the purpose of avoiding notice. What actually took place was this: they had notice that the mortgaging company had issued debentures. I desire carefully to reserve my opinion as to whether, in the case of ordinary mortgagees, notice that a joint-stock company had issued debentures, if the mortgagees made no further inquiry, would bring the case within the second branch of the proposition. But, looking to what we all know now as to the form in which companies issue their debentures, I think that a person who lent money on the security of the company's property, knowing that they had issued debentures, and abstaining from making further inquiry, might—I do not say he would—come within the second branch. That question, however, does not arise here. The question is, whether the doctrine of constructive notice, as defined by Wigram, V.C., extends to bind the mortgagees in this case, so as to put the debentures in front of the security they were taking, and to make them in effect second mortgagees subject to the debentures. Now reading the question put by the mortgagees' solicitor to the managing director of the Electrical Company, and the answer given to that question, as stated in the judgment of Charles, J., I am clearly of opinion that the question must have been intended to ask whether the debentures were of such a nature as not to effect a charge upon the property which could affect the plaintiffs' mortgage. The inquiry would be absurd if the solicitor only meant to ask if there was a covering deed. The question must have been intended to make it clear that there was no charge upon the property which could in any way be preferred to the plaintiffs' mortgage. The answer was intended to make out that there was not, and that was confirmed in the solicitor's mind by the letter which had been received from the Sun Fire Office stating that no notice of any charge had been given to them. This case,

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therefore, comes within the proposition laid down by Lord Lyndhurst in *Jones* v. *Smith* (1), from which the passage read by the Master of the Rolls from the note to *Le Neve* v. *Le Neve* (2), in Tudor's Leading Cases in Equity (3), is substantially taken. It exactly comes within these words: "Where a party has notice of a deed which does not necessarily—which may or may not—affect the property, and is told that in fact it does not affect it, but relates to some other property, and the party acts fairly in the transaction, and believes the representation to be true." Lord Lyndhurst went on to say that he was not disposed to extend the doctrine of constructive notice. I venture to say that the doctrine of constructive notice, if carefully applied and limited in the way pointed out by Wigram, V.C., and Lord Lyndhurst, is a doctrine which will never defeat the ends of justice, but will promote them always. If we were to apply it as we are asked to apply it in this case, we should not only be extending it beyond what has been laid down in any previous case, but we should be extending it beyond the limits which Lord Lyndhurst and Wigram, V.C., so carefully defined. I decide this case entirely upon the assurance given by the managing director of the Electrical Company, which was intended to make the proposed mortgagees believe that their mortgage would be a first charge upon the company's property. Although I am not sure I have followed strictly the lines of the judgment in the Court below, in the result I think that judgment was entirely right. This appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant: *Dowson, Ainslie, & Martineau.*
Solicitors for the respondents: *Paine, Son & Pollock.*

(1) 1 Ph. 244, at pp. 253, 254. (2) 1 Amb. 436; 2 Tu. L. C., 6th ed. p. 26.
(3) 2 Tu. L. C., 6th ed. p. 56.

W. A.

THE QUEEN *v.* THE JUSTICES OF SURREY AND BELL. 1892 *Aug.* 8.

Justices—Quarter Sessions—Appeal against Summary Conviction—Grounds of Appeal—Excessive Punishment—Jurisdiction to quash Conviction.

On an appeal against a summary conviction the only ground stated in the notice of appeal was that the punishment inflicted was excessive. The respondents did not appear at the hearing; and, upon the appellant duly proving his notices of appeal, the court of quarter sessions quashed the conviction:—

Held, that the Court had jurisdiction to quash the conviction, and had taken the proper course.

RULE calling upon the justices of the county of Surrey and one Philip Henry Bell to shew cause why a writ of certiorari should not issue to bring up, for the purpose of quashing it, an order made by the justices at quarter sessions quashing a conviction by a metropolitan police magistrate.

P. H. Bell was convicted at the Wandsworth Police Court for having unlawfully caused a horse to be cruelly ill-treated, abused, and tortured, contrary to the provisions of 12 & 13 Vict. c. 92, and sentenced by the magistrate to fourteen days' imprisonment with hard labour.

Bell duly gave notices of appeal against this conviction to quarter sessions, the only ground of appeal stated in the notices being that the punishment inflicted by the magistrate was excessive.

Upon the appeal coming on to be heard, the respondent, who was an officer of the Society for the Prevention of Cruelty to Animals, and had laid the information against Bell, did not appear, nor was he represented by any counsel or solicitor; and the appellant having duly proved his notices of appeal, the justices at quarter sessions quashed the conviction.

This rule was thereupon obtained on behalf of the respondent.

Poland, Q.C. (*Elliott*, with him), for the appellant, shewed cause against the rule. The quarter sessions had jurisdiction to quash the conviction. Upon an appeal against a conviction the onus of proving that the conviction was right is on the prosecutor. If he does not appear at the hearing of the appeal, the

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conviction should be quashed: *Reg.* v. *Purdey.* (1) By s. 26 of 12 & 13 Vict. c. 92, no conviction under that Act, nor any order, judgment, or proceeding relative thereto, shall be removed by certiorari, though *Reg.* v. *Chantrell* (2) shews that s. 26 does not apply if the order sought to be removed was made absolutely without any jurisdiction. Here the appellant appeared on the hearing of the appeal, and proved his notices of appeal. The court of quarter sessions then had seisin of the appeal, and jurisdiction to entertain it. No objection was taken on the part of the respondent to the jurisdiction. If such an objection had been taken, the justices could have amended the notice of appeal by adding a new ground of appeal, under 12 & 13 Vict. c. 45, s. 3 (Baines' Act), or they could have adjourned the hearing. The procedure on appeals against convictions under 12 & 13 Vict. c. 92 is now regulated by the Summary Jurisdiction Act, 1877 (42 & 43 Vict. c. 49), s. 31. By sub-s. 5 the court of appeal may adjourn the hearing of the appeal, and upon the hearing thereof may confirm, reverse, or modify the decision of the Court of summary jurisdiction. By s. 16 of that Act the court of summary jurisdiction, although they convict, may pass no sentence at all; and, if the circumstances of the case required it, the quarter sessions on appeal would be justified in taking that course. This Court has an absolute discretion as to granting a writ of certiorari, which is not a writ granted as of course, unless it be asked for by the Crown: *Reg.* v. *Justices of Surrey.* (3) It is contended that the discretion should not be exercised by granting a certiorari in this case. The appeal to quarter sessions is a re-hearing; and this, even if the decision be on a question of law: *Reg.* v. *Justices of Middlesex* (4); so that no writ of mandamus calling upon the justices to hear and determine the case could be obtained, however erroneous their decision might have been. The question of the sufficiency of the appellant's notices of appeal would be a question to be determined by the quarter sessions, not by this Court.

Colam, for the respondent, supported the rule. The record is bad on the face of it, and shews that the order of the court of

(1) 5 B. & S. 909; 34 L. J. (M.C.) 4.
(2) Law Rep. 10 Q. B. 587.
(3) Law Rep. 5 Q. B. 466.
(4) 2 Q. B. D. 516.

quarter sessions was made without jurisdiction. By 12 & 13 Vict. c. 45, s. 1, the appellant cannot go into any ground of appeal not stated in the notice of appeal, and no amendment of the notice having been made under s. 3 of that Act, it is apparent that the order of quarter sessions was made without any jurisdiction. The justices ought to have adjourned the hearing of the appeal. They could not quash the conviction on the ground that the punishment was excessive. The onus was on the appellant, on that notice of appeal, to shew some reason why the sentence should be reduced.

LORD COLERIDGE, C.J. In this case I must not be taken to express any opinion whatever upon the merits. I am sorry to have to decide the case upon purely technical points; but it appears to me that the rule for a certiorari ought not to be made absolute for two reasons. First, so far as I can see by the light of the authorities, the proper practice was pursued by the quarter sessions. In Dickenson's Guide to the Quarter Sessions, 6th ed., p. 642, I find the practice stated thus: "When the appeal is brought regularly before the sessions . . . and is not adjourned, the leading counsel for the respondent, as the party sustaining the order or other act complained of, opens his case on the merits, and adduces evidence in support of it, without being confined to that produced before the magistrates below." In the present case the respondent wanted to sustain the punishment inflicted by the magistrates, which was questioned by the notice of appeal. That being so, the court of quarter sessions followed the common practice; they required the respondent to shew that the punishment was properly inflicted. The rule, that on an appeal to quarter sessions in rating cases the respondent should begin, is laid down by Lord Kenyon, C.J., in *Rex* v. *Newbury*. (1) He gave reasons for the rule, and Buller, J., supported him. Those reasons apply equally to an appeal from a conviction. Secondly, the practice having been rightly followed by the court of quarter sessions, and the respondent, who ought to have been there to support the conviction and sentence, not being there, it was only possible—physically possible, I mean—for the justices

(1) 4 T. R. 475, at p. 476.

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to do two things. They might have altered the punishment, but that they ought not to have done because nobody was there to shew them what the right punishment should be. They might have struck out the sentence and left the conviction; but then, on the authority of Lord Mansfield, in *Rex* v. *Vipont* (1), the conviction would be bad. If, therefore, they had done the only other thing they could do besides quashing the conviction, the conviction would have been reduced to nothing. I am of opinion that they took the proper course in quashing the conviction. Although, as I have said, I regret to have to decide this case on technical grounds, still they are founded on good sense. We must stand upon what has been decided, and there are very good reasons for the rule which has been laid down. I therefore think this rule should be discharged.

CAVE, J. I am of the same opinion. When one comes to look into the matter, the course adopted by the magistrates at quarter sessions seems to have been the only course which they could adopt. A conviction consists of two parts—the conviction and the sentence; that is, the verdict and the judgment. The appeal may be against the whole or against a part of the conviction. Here the appellant appealed against the judgment, not against the verdict. He appeared at quarter sessions and proved his notices of appeal in the usual way, so as to place himself properly before the Court. What was to happen next? In appeals to the High Court the evidence given in the Court below is always before the Court to which the appeal is brought. The appellant, therefore, is called upon to begin, and to shew that the evidence does not justify the verdict which has been given, or that the Court below has gone wrong in point of law. But in appeals to quarter sessions the evidence in the Court below is not before the quarter sessions. They have no right to depend upon the mere words of the judgment. It is the very thing appealed against. The respondent must begin, and must prove the matters complained of. The Court must decide upon the evidence brought before them on the appeal. There is nothing except that evidence to shew that any offence has been com-

(1) 2 Burr. 1163.

mitted. When the judgment of the Court below is complained of, and not the verdict, the Court to which the appeal is brought may think that technically an offence has been committed; but until evidence is given they cannot tell whether this or that sentence ought to be given. It is for the respondent to give evidence to shew what the facts in the case are, so as to enable the Court to give the judgment which it is asked to give. Here the respondent was not there to shew what the adjudication of the court of quarter sessions ought to be. No evidence at all of that kind was given before the Court. What could the Court do? They could not substitute seven days' imprisonment for the sentence which had been passed upon the appellant. There was no evidence before them that seven days was the right sentence; no evidence that fourteen days was; no evidence that any punishment at all ought to be inflicted. They could only say that the sentence was not right, and the only thing to do was to strike out the adjudication. But when they did that the conviction was bad. They were, therefore, right in quashing the conviction. They were only doing that which would be the legal consequence of striking out the adjudication. They were only doing that which as matter of law would be done for them when the adjudication was struck out. This rule should be discharged.

Rule discharged.

Solicitor for appellant: *George F. Bell.*
Solicitor for respondent: *A. Leslie.*

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[IN THE COURT OF APPEAL.]

SCOTT *v.* BROWN, DOERING, McNAB & CO.
SLAUGHTER & MAY *v.* BROWN, DOERING, McNAB & CO.

Illegality—Stock Exchange—Contract for Purchase of Shares—Agreement to buy Shares at a fictitious Premium—Rigging the Market—Conspiracy—Action to recover Money paid on Purchase.

An agreement between two or more to purchase shares in a company in order to induce persons who might thereafter purchase shares in such company to believe, contrary to the fact, that there was a bonâ fide market for its shares, and that the shares were at a real premium, is an illegal transaction and may be made the subject of an indictment for conspiracy, and no action can be maintained in respect of such agreement or purchase of shares.

The plaintiff brought an action against the defendants who were stockbrokers, through whom he had purchased shares in a projected company, to obtain rescission of the contract for the purchase of such shares, and to recover back the purchase-money which he had paid in respect of them to the defendants, on the ground that the defendants, while acting as the plaintiff's brokers, had delivered their own shares to him instead of purchasing them upon the Stock Exchange. At the trial it appeared upon the plaintiff's own case that the money sought to be recovered had been paid by the plaintiff in pursuance of an agreement between him and one of the defendants by which such defendant was with the money to purchase upon the Stock Exchange a number of shares in the projected company at a premium with the sole object of inducing the public to believe that there was a real market for the shares and that they were at a real premium, which, in fact, as the plaintiffs and defendants well knew, they were not:—

Held, that the action was based upon an illegal contract, and could not be maintained.

APPLICATIONS for new trial.

These consolidated actions were tried before Wright, J., and a special jury at the Guildhall, on May 6 and 7, 1892.

At the trial, it appeared that Messrs. Brown, Doering & McNab, the defendants in both actions, were members of the London Stock Exchange, carrying on business in partnership together; and in December, 1890, they were brokers to a company called the Steam Loop Company, Limited. That company had issued a prospectus inviting subscriptions for its share capital, and the defendants had previously to such issue underwritten a part of the share capital of the company and were holders of a considerable number of its shares. Mr. Dugald Scott, the

plaintiff in the first action, was a promoter of the company and interested in it, in the expectation that his brother, who was an engineer, would be appointed one of its agents. Messrs. Slaughter & May, the plaintiffs in the second action, were the solicitors of the company, and also the solicitors of Mr. Scott. Mr. Gillespie, whose name is hereinafter mentioned, was one of the principal promoters of the company. The plaintiffs in both actions had instructed the defendants, Messrs. Brown, Doering & McNab, to purchase shares for them respectively in the company, and had duly paid for such shares. The plaintiffs in both actions sought to recover the price paid for such shares from the defendants, on the ground, among others, that instead of purchasing shares for them in the ordinary way, the defendants had transferred to the plaintiffs the defendants' own shares.

The plaintiffs in both actions relied upon a contract contained in certain letters and telegrams passing between the plaintiffs and the defendants between the 6th and 9th of December, 1890. On December 6, 1890, the following telegrams passed:—McNab to Scott.—"Should advise you to get 5000 done by Trust Company Steam Loop." McNab to Scott.—"Must have positive order from you to buy at least 500 Loop shares in market on Monday, to start market on. Gillespie and Jack doing this on understanding that you do so. This necessary to insure public application and to start market. Reply." McNab to Scott.—"Unless have telegram agreeing to my former wire as to market in shares, I must withdraw from this business." McNab to Scott.—"You must agree, otherwise I drop the whole thing, as without it advertisements wasted and no public application; also no market in shares. Waiting reply." Scott to Slaughter.—"McNab wires me I must give him positive order buy 500 Loop shares in market on Monday start market. Gillespie and Jack doing same condition I do. Wired no. McNab replies must, otherwise he will drop whole business. I reply by writing him to-night. Wire what you advise." Slaughter to Scott.—"Have agreed with McNab that the 500 Gillespie owed us may be applied market purposes. Think additional support needed. Written you fully to-night." Scott to Slaughter.—"Am quite agreeable to what you have arranged with McNab." On the

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same day McNab wrote to Scott a letter which, so far as is material, was as follows:—

"As I wired you to-day, it is an absolute necessity that somebody sends orders to buy Steam Loop in the market, otherwise who is going to start the market? Slaughter and myself are going 500 shares, Gillespie 500, Burnham 100, Jack 200, and honestly you ought to go at least 500. There is no risk in the matter. We have absolutely 47,000*l.* underwritten, and whatever the public come in for will help the market. Then, again, unless we can get a quotation into the papers, saying the shares are at a premium, on Monday, we will never get the public on. This we can manage with practically no risk to ourselves if we combine and absolutely buy the shares. If we do not do it, the money spent on advertisements is simply thrown away. . . . If I am to go on at all I must know that some one is going to back me up in at least starting the market in the shares. If it is not done I must give up the whole business, as otherwise I will be nothing more than a fool in this business. It is a vital point, and, whatever you write me to-night, please understand that it has to be done, and I must have orders on Monday from some one in Manchester to start the market on. . . . Do give this matter your assent, and wire me early on Monday that you are good for a purchase of at least 500 shares in the market. You must excuse my having written and wired so strongly about this, but it is an absolute necessity that it has to be done. You have only to ask any one about new companies if it is not a necessity. Awaiting your reply on Monday morning."

On December 7, 1890, Scott wrote in reply to Slaughter:—

"As I wired you last night, I am quite agreeable that the 500*l.* you, McNab, and I lent Gillespie shall be used to make a market, on condition that Gillespie gives you a written promise to pay me 500*l.* in cash as soon as he has received his cash from the company. I am agreeable to this 500*l.* also being spent in making a market, if you are." On December 8, 1890, Slaughter wrote to McNab:—"Steam Loop.—On behalf of Mr. D. Scott, I hereby authorize you to buy at a premium ordinary shares up to 500*l.*" On the same day, Gillespie wrote to Slaughter:—

"You having authorized Mr. McNab on Mr. Scott's behalf to

buy at a premium ordinary shares up to 500*l.*, I write this line to confirm to you that it has been agreed between us that the 500*l.* in cash or the 600*l.* in shares which I have promised to Mr. Scott shall be 500*l.* in cash, and shall be paid out of the second instalment I receive."

On December 9, 1890, Brown, Doering & Co. wrote to Slaughter as follows:—

"We beg to enclose contract for purchase of 429 Loop shares at 6*s.* 7*d.* premium. This is your proportion of the shares bought up to-night, taking an average of the orders from D. Scott, Gillespie, Burnham, and Jack. We have also averaged the price of the shares. We have forwarded to the *Financial News* the contract note for shares bought to-day on your behalf—150 shares at 8*s.* 4½*d.* premium—to get the quotation. The shares are of course with last night's 150 included in the general average. The shares are dealt with for special settlement. The premium goes out to-night ⅜ to ½."

On the same day the defendants wrote to Scott to the same effect, saying: "We have arranged to have the quotation sent to all the provincial papers to appear to-morrow, namely, ⅜ to ½ premium."

Wright, J., held that there was no evidence upon which the jury could reasonably find that the defendants' firm, Brown, Doering & Co., had transferred to the plaintiff their own shares; and he directed the jury that there must be a verdict for the defendants. The learned judge then drew the attention of the jury to the letters of McNab to Scott of December 6th, of Slaughter to NcNab and Gillespie to McNab of December 8th, of Brown, Doering & Co. to Slaughter and Scott of December 9, 1890, and continued:—I am not going in this case either to express any opinion myself, or to ask you to express an opinion, as to what these particular parties did; but as the question has arisen, I do say that if persons, for their own purposes of speculation, create an artificial price in the market by transactions which are not real, but are made at a nominal premium merely for the purpose of inducing the public to take shares, they are guilty of as gross a fraud as has ever been committed, and of a fraud which can be brought home to them in a criminal court.

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The plaintiffs in both cases made application for a new trial.

Reid, Q.C., and *Boydell Houghton*, for the plaintiffs in both actions.

Willis, Q.C., and *C. Rose-Innes*, for the defendants Brown and Doering.

Murphy, Q.C., and *P. Rose-Innes*, for the defendant McNab.

The Court intimated the evidence adduced by the plaintiffs appeared to disclose a criminal conspiracy of which they ought to take judicial notice, and that they would take time to consider their judgment.

Cur. adv. vult.

1892. Aug. 1. LINDLEY, L.J. My brother Smith has written a judgment in this case, which I have read, and in which I concur. As, however, the case is one of great importance, I will add a few observations on it myself.

Ex turpi causâ non oritur actio. This old and well-known legal maxim is founded in good sense, and expresses a clear and well-recognised legal principle, which is not confined to indictable offences. No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the Court ought not to assist him. If authority is wanted for this proposition, it will be found in the well-known judgment of Lord Mansfield in *Holman* v. *Johnson*. (1)

In this case the correspondence put in evidence by the plaintiff in support of the claim he made at the trial shews conclusively that the sole object of the plaintiff in ordering shares to be bought for him at a premium was to impose upon and to deceive the public by leading the public to suppose that there were buyers of such shares at a premium on the Stock Exchange,

(1) Cowp. 343.

when in fact there were none but himself. The plaintiff's purchase was an actual purchase, not a sham purchase; that is true, but it is also true that the sole object of the purchase was to cheat and mislead the public. Under these circumstances, the plaintiff must look elsewhere than to a court of justice for such assistance as he may require against the persons he employed to assist him in his fraud, if the claim to such assistance is based on his illegal contract. Any rights which he may have irrespective of his illegal contract will, of course, be recognised and enforced. But his illegal contract confers no rights on him: see *Pearce* v. *Brooks*. (1) The illegal purpose of the plaintiff distinguishes this case from *Wetherall* v. *Jones* (2), and others of a similar kind. I am quite aware that what the plaintiff has done is very commonly done; it is done every day. But this is immaterial. Picking pockets and various forms of cheating are common enough, and are nevertheless illegal. The plaintiff was not entitled to judgment in the Court below, and he has no right to a new trial.

LOPES, L.J. The defendants in both these actions are members of the London Stock Exchange. On December, 1890, they were brokers to a company called the Steam Loop Company, Limited. That company had issued a prospectus inviting subscriptions for its share capital, and the defendants had, previously to such issue, underwritten a part of such share capital, and were holders of a considerable number of shares in the company. The plaintiffs in the second action were solicitors to the company. The plaintiffs in both actions had instructed the defendants to purchase shares for them respectively in the company, and had duly paid for such shares. The plaintiffs in both actions sought to recover the price paid for such shares from the defendants upon the ground, amongst others, that instead of purchasing shares for them in the ordinary way, the defendants had transferred to the plaintiffs the defendants' own shares. The learned judge held that there was no evidence to go to the jury in support of the plaintiffs' case, and nonsuited them. In my judgment it is unnecessary to determine whether the holding of

(1) Law Rep. 1 Ex. 213. (2) 3 B. & Ad. 221.

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the learned judge is right in this respect. There is a preliminary matter to be considered, of which the learned judge might have taken, and this Court can and ought to take, judicial notice. The plaintiffs in both actions rely upon a contract contained in certain letters and telegrams passing between the plaintiffs and defendants, between December 6 and 9, 1890, and which are as follows:—[The Lord Justice then referred to the letters and telegrams, and continued:—] I have read these letters and telegrams to shew what the nature of the transaction was. In my judgment it was an agreement between the plaintiffs and defendants to induce would-be buyers of shares in this company, contrary to the fact, to believe there was a market for its shares, and that the shares were of greater value than they really were. Putting it shortly—an agreement to cheat the public by leading them to believe the shares had a value, which the plaintiffs and defendants knew they had not, and thus inducing them to become purchasers. Is such a transaction illegal? I am of opinion that it is, and might be made the subject of an indictment for conspiracy.

Rex v. *Berenger* (1) is an authority on this subject. It was an indictment for conspiracy by false rumours to raise the price of the public government funds with intent to injure those who should purchase, and Ellenborough, C.J., said (p. 72):—

"A public mischief is stated as the object of this conspiracy; the conspiracy is by false rumours to raise the price of the public funds and securities; and the crime lies in the act of conspiracy and combination to effect that purpose, and would have been complete, although it had not been pursued to its consequences, or the parties had not been able to carry it into effect. The purpose itself is mischievous: it strikes at the price of a vendible commodity in the market, and if it gives it a fictitious price, by means of false rumours, it is a fraud levelled against all the public, for it is against all such as may possibly have anything to do with the funds on that particular day."

I can see no substantial distinction between false rumours and false and fictitious acts; the price of the shares in this case was artificial, and the premium unreal and nominal, to the knowledge

(1) 3 M. & S. 67.

of all parties concerned, put forward to induce the public to take shares, with which otherwise they would have had nothing to do.

Again, in *Reg.* v. *Aspinall* (1) it was held that an agreement to cheat and defraud by means of false pretences those who might buy shares was an indictable offence. Brett, L.J., said (2):—

"If the second count in this indictment contains averments sufficiently stated which are enough to shew sufficiently that the defendants unlawfully—namely, with minds intending to do wrong—agreed by false pretences to cheat and defraud those who might buy shares in the company, it sufficiently alleges a criminal conspiracy."

I entertain no doubt that the agreement on which the plaintiffs rely is an illegal agreement. If the agreement is illegal, the question arises, whether the plaintiffs are not disentitled to recover, and whether they have not forfeited the relief which a court of law in other circumstances would have afforded them. *Begbie* v. *Phosphate Sewage Co.* (3) is conclusive on this point. It was an action for money had and received, plea never indebted, and it was held that the plaintiff could not recover because he was aware that no exclusive right to use the process in question could be obtained, and had entered into the contract with the defendants in contemplation of a fraud upon the shareholders of the intended company. Cockburn, C.J., said (p. 499):—

"Another ground of defence insisted on is that the money having been paid for the purpose of defrauding the intended shareholders, by holding out to them the assurance of an exclusive right to use the process in question, as an inducement to contribute their money, when it was known to the parties engaged in getting up the new company that no exclusive right existed, or could be obtained, the plaintiff cannot maintain an action to recover back the money on the well-established principle that money paid in furtherance of a fraud or other unlawful purpose cannot be recovered back. . . . Under these circumstances we are of opinion that the money sought to be recovered in this action having been paid in order to obtain from the

(1) 1 Q. B. D. 730; 2 Q. B. D. 48. (2) 2 Q. B. D. 59.
(3) Law Rep. 10 Q. B. 491.

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defendants the agreement whereby this fraud could be carried out, the rule of law insisted on by the defendants applies, and is a bar to the plaintiff's right to recover. The case falls immediately within the principle of the decisions in *Simpson* v. *Bloss* (1); *Jones* v. *Yates* (2), and *Fivaz* v. *Nicholls*. (3) The plaintiff cannot present his case to a jury without necessarily disclosing the unlawful purpose in furtherance of which this money was paid."

Every word of that judgment applies. It is to be observed that the illegality of the contract was not pleaded. The point was taken by the Court and acted upon. The plaintiffs cannot, and do not, in this case more than in that, present their case to the jury without necessarily disclosing the unlawful purpose in furtherance of which the contract was entered into. The plaintiffs, therefore, in my opinion, are disentitled to relief, and on this ground the appeal must be dismissed.

A. L. SMITH, L.J. The plaintiff Scott applies to this Court to set aside a nonsuit which passed against him at the Guildhall. He asserts that there was evidence to go to the jury of his cause of action, which was for the rescission of a contract to purchase shares in a company about to be brought out and to be called the Steam Loop Company, and for the return of 632*l.* 3*s.* 5*d.*, paid thereunder to the defendants, upon the ground, amongst others, that the defendants, while acting as his brokers, had passed off their own shares to him instead of purchasing them upon the market. It appeared upon the plaintiff's own case that the plaintiff and the defendant McNab were jointly interested with others in bringing out this company and in floating its shares upon the market, and that the 632*l.* 3*s.* 5*d.* sought to be recovered in this action was paid by the plaintiff to the defendants in pursuance of an agreement come to between the plaintiff and the defendant McNab that McNab should therewith purchase 500 shares of the projected company, when brought out, at a premium (at the time of the agreement there was neither company nor market), the sole object of such purchase being that

(1) 7 Taunt. 246. (2) 9 B. & C. 532.
(3) 2 C. B. 501.

the public might thereby be induced to believe that there was a real market for the shares, and that they were at a real premium, whereas in truth and in fact, as the plaintiff and the defendant McNab well knew, they were not. Neither the plaintiff nor the defendants would raise the point of the illegality of the transaction at the trial, and my brother Wright, who tried the case, made some strong comment upon their conduct, but did nothing further in the matter.

If two or more persons agree to cheat and defraud others by means of deceit and fraud, there can be no doubt that each and all are indictable for a criminal conspiracy at common law. It has been held that it is a criminal conspiracy for two or more to agree by false rumours to endeavour to raise the price of the public funds on a particular day: *Rex* v. *Berenger*. (1) It has also been held in *Reg.* v. *Aspinall* (2) that an agreement by two or more to cheat and defraud by means of false pretences those who might buy shares in a company was an indictable conspiracy. False pretences here do not mean such false pretences as would support an indictment for obtaining money or goods by false pretences. See *Reg.* v. *Hudson*. (3) Lopes, L.J., has gone fully into the correspondence; but the telegram and letter of December 6, 1890, from the defendant McNab to the plaintiff, the letter of December 7, 1890, from the plaintiff to Slaughter, and of December 8, 1890, from Slaughter to McNab, in my judgment, are sufficient. These documents contain conclusive proof that the plaintiff and McNab agreed together to cheat and defraud those who might buy shares in the company, by leading them to believe that the shares were at a genuine premium in the market, whereas to their knowledge they were not, the fictitious premium being sought to be brought about by means of the purchases to be made with the plaintiff's 632*l.* 3*s.* 5*d.* by McNab, and which were to be made for the sole purpose of creating such fictitious premium. These documents were read by the plaintiff's counsel when he opened his case, as shewing the purposes for which the plaintiff, and the defendant McNab, had agreed that the purchases should be made. The

(1) 3 M. & S. 67.
(2) 1 Q. B. D. 730; 2 Q. B. D. 48.
(3) Bell, C. C. 263.

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agreement between two or more to do an illegal act has been proved.

The next question is, Was it shewn that the plaintiff and McNab agreed to carry out this intention by illegal means—viz., by deceit and fraud? For, if so, there can be no possible doubt that an indictable conspiracy has been committed—viz., the agreement to do an illegal act by illegal means. It is not necessary in this case to discuss whether the whole of this must be proved to constitute an indictable conspiracy. It is said for the plaintiff that there was nothing deceitful or fraudulent in the fact of his paying his 632*l.* 3*s.* 5*d.* to McNab to purchase shares with upon the open market, and if that had been all I agree; but the question is, Was the payment made as it was for the sole purpose of creating therewith a fictitious premium, in order to induce the public to purchase shares in the company, and thereby benefit the plaintiff and McNab at the expense of the buyer—a deceitful and fraudulent means whereby to cheat and defraud those who might buy shares in the company?

I am of opinion that it was.

Test it in this way. Suppose a purchaser induced to purchase shares of the plaintiff or McNab by means of the fictitious premium created by them solely for the purpose of inducing such purchaser and others to buy, could he or not have successfully sued either or both for a false and fraudulent misrepresentation? I say that he could, and this is another way of stating the same proposition—viz., that the plaintiff and McNab agreed by means of deceit and fraud to cheat and defraud the would-be purchasers of shares. The agreement to do an illegal act by illegal means is proved, and for the reasons above both the plaintiff and McNab were liable to be indicted for conspiring to cheat and defraud.

Now, how does the law stand upon the subject? If a plaintiff cannot maintain his cause of action without shewing, as part of such cause of action, that he has been guilty of illegality, then the Courts will not assist him in his cause of action. This was decided in *Taylor* v. *Chester* (1), where the illegality was pleaded, and also in *Begbie* v. *Phosphate Sewage Co.* (2), where it was not pleaded, but, the fraud being apparent, the Court would not

(1) Law Rep. 4 Q. B. 309. (2) Law Rep. 10 Q. B. 491.

interfere. When the plaintiff's statement of claim is looked at it will be seen that he there states the purposes for which he handed the money to the defendants—viz., to "keep up the price of the shares," which upon the evidence was shewn to be "to create a fictitious premium."

In my judgment, the plaintiff, when suing the defendants for breach of contract, as he does, has to prove the whole contract, and it was not competent for him to put in evidence only half of the contract, and he did not do so, for the letters above read were opened by his learned counsel as part of his case. Immediately the whole contract upon which the plaintiff sues is put in, the illegality of the conduct of the plaintiff and of McNab at once becomes apparent. In my opinion, the maxim "In pari delicto potior est conditio possidentis" applies, and this Court ought not to assist the plaintiff when he seeks to recover the 632*l.* 3*s.* 5*d.* back from the defendants. Upon these grounds, and without going further into the case, this appeal must be dismissed, and with costs.

Appeal dismissed.

Solicitor for plaintiffs: *C. T. Whinney.*
Solicitor for defendants: *A. L. Armitage.*

W. W. K.

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June 20, 24; *July* 2.

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Local Government—County Council—Main Roads—Costs of Repair of Main Roads in Counties divided into Hundreds—Exchequer Contribution Account—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 *Vict. c.* 77), *s.* 20—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *ss.* 11, 23, 68.

The county authority of a county, the whole of which was divided into hundreds, made an order, under s. 20 of the Highways and Locomotives (Amendment) Act, 1878, declaring every main road in each hundred to be repairable by that hundred, and one-half the expense of repairing the same to be repayable out of a separate rate levied on the hundred. Sect. 11 of the Local Government Act, 1888, casts the duty of maintaining and repairing all main roads within the county upon the county council, and provides that "the execution of this section shall be a general county purpose, and the costs thereof shall be charged to the general county account"; and, further, that s. 20 of the Highways and Locomotives (Amendment) Act, 1878, "shall apply as if it were herein re-enacted and in terms made applicable to this section." By s. 23 of the Local Government Act, 1888, all sums for the time being standing to the exchequer contribution account, which is an account of sums received by the county council in respect of certain duties on local taxation licences, and the probate duty grant made to the county by the Commissioners of Inland Revenue, shall be applied (after making certain other specified payments) "in repaying to the general county account of the county fund the costs on account of general county purposes for which the whole area of the county is liable to be assessed to county contributions." By s. 68, "general county purposes" are defined as "all purposes declared by this or any other Act to be general county purposes, and all purposes for contributions to which the county council are for the time being authorized by law to assess the whole area of their administrative county"; and "special county purposes" are defined as "any purposes from contribution to which any portion of the county is for the time being exempt," including "any purposes where the expenditure involved is by law restricted to a hundred, division, or other limited part of the county":—

Held, that the maintenance and repair of main roads in the hundreds were "general county purposes" within the meaning of ss. 11, 23, and 68 of the Local Government Act, 1888; so that the county council were entitled to apply moneys taken from the Exchequer Contribution Account in recouping the general county fund so much of the costs of such maintenance and repair as was not provided for by the special rates on the hundreds.

ORDER NISI calling upon John Dolby, Esquire, auditor of the north-western counties district in the county of Lancaster, to shew cause why a writ of certiorari should not issue directed to him to bring up, for the purpose of quashing it, an order or

certificate of disallowance made by him of the sum of 114,554*l.* in the accounts of the county council for the year ending March 31, 1891.

By the Highways and Locomotives (Amendment) Act, 1878, (41 & 42 Vict. c. 77), s. 13, disturnpiked roads are to become main roads, and half the expenses of the maintenance thereof is to be paid by the county authority out of the county rate to the highway authority of the highway area within the limits of which the road is.

By s. 20: "Notwithstanding the provisions of this Act, in the case of any county in which certain of the bridges within the county are repairable by the county at large, and others are repairable by the several hundreds within the county in which they are situate, it shall be lawful for the county authority from time to time, by order, to declare any main road, or part of a main road, within their county to be repairable, to the extent only and in manner provided by section thirteen of this Act, either by the county or by the hundred in which such main road or part is situate, as they think fit; and where a main road or part thereof is declared to be repairable by a hundred, the expense of repairing the same shall, to the extent to which but for this section the expense or any contribution towards the expenses of repairing the same would be repayable out of the county rate, be repayable out of a separate rate which shall be raised and charged in the like manner as the expenses of repairing the hundred bridges in the same hundred would have been raised and charged."

By the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 11 (1.) "Every road in a county, which is for the time being a main road within the meaning of the Highways and Locomotives (Amendment) Act, 1878 . . . . shall, after the appointed day, be wholly maintained and repaired by the council of the county in which the road is situate . . . ."; and (13.), "sect. 20 of the Highways and Locomotives (Amendment) Act, 1878, shall apply as if it were herein re-enacted, and in terms made applicable to this section."

By s. 20 the Commissioners of Inland Revenue shall from time to time pay into the Bank of England to an account called

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the "Local Taxation Account," sums collected by the commissioners in each administrative county on certain licences specified in the first schedule to the Act, and called "local taxation licences;" and the amount so collected in each administrative county shall, from time to time, be certified by the commissioners, and paid under the direction of the Local Government Board out of the local taxation account to the council of such county.

By s. 21 the Commissioners of Inland Revenue are also directed to pay, from time to time, into the local taxation account a certain proportion of the probate duties collected by them.

By s. 23 (1.): "All sums from time to time received by a county council in respect of (*a*) the duties on the local taxation licences, whether collected by the Commissioners of Inland Revenue or by the county council; and (*b*) the probate duty grant, shall be paid to the county fund and carried to a separate account, in this Act referred to as the 'exchequer contribution account.'

(2.) All sums for the time being standing to the exchequer contribution account shall be applied (i.) in paying the costs incurred in respect thereof, or otherwise chargeable thereon; and (ii.) in payment of the sums required by this Act to be paid by the county council in substitution for local grants; and (iii.) in payment of the grant required by this Act to be made by the county council in respect of costs of union officers; and (iv.) in repaying to the general county account of the county fund the costs on account of general county purposes for which the whole of the area of the county is liable to be assessed to county contributions; and shall be so applied in the order above mentioned."

By s. 68, "(1.) All receipts of the county council, whether for general or special county purposes, shall be carried to the county fund, and all payments for general or special county purposes shall be made in the first instance out of that fund.

"(2.) In this Act the expression 'general county purposes,' means all purposes declared by this or any other Act to be general county purposes, and all purposes for contributions to which the county council are for the time being authorized by law to assess the whole area of their administrative county, and

the expression 'general county account' means the account of the county fund to which the contributions so raised are carried, and any costs incurred for a general county purpose shall be general expenses, and all costs incurred by the county council in the execution of their duties which are not by law made special expenses shall be general expenses.

"(3.) In this Act the expression 'special county purposes' means any purposes from contribution to which any portion of the county is for the time being exempt, and also includes any purposes where the expenditure involved is by law restricted to a hundred, division, or other limited part of the county; and the expression 'special county account' means any account of the county fund to which contributions for special county purposes are carried, and any costs incurred for a special county purpose shall be special expenses."

The County Palatine of Lancaster is divided into six hundreds, and by orders made in pursuance of s. 20 of the Highways and Locomotives (Amendment) Act, 1878, the county authority have declared every main road, or part of a main road, in each hundred to be repairable by the hundred, and one-half the expenses of repairing the same to be repayable out of a separate rate levied on the hundred.

In the year 1887 Parliament by vote repaid to the county one-half of the expenditure upon main roads, and up to the year 1889, when the Local Government Act, 1888, came into operation, continued that payment in aid of the main road expenditure.

In auditing the accounts of the county council for the financial year ending March 31, 1891, the district auditor disallowed a sum of 114,554*l.*, which was entered to the credit of the exchequer contribution account as a transfer from that account to the main roads account. The entry was as follows:—

"To Main Roads Account.

"For the year ending March 31, 1890 .	£69,554 0 0	
"For the year ending March 31, 1891 .	45,000 0 0	
		£114,554 0 0."

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It appeared that the whole expenses of repairing the main roads in each hundred were paid in the first instance out of the general county fund. The amount of the special rate collected in each hundred was paid into the main roads account of the general county account. The sum of 114,554*l.*, taken from the exchequer contribution account, was the balance necessary to recoup the general county account the expenses of repairing main roads in the hundreds after applying the amount of the special rates collected in the hundreds to that purpose. The auditor having certified that he disallowed the transfer entries of 114,554*l.*, and had corrected the accounts of the county council accordingly by re-transferring the same sum to the exchequer contribution account, this rule was obtained on behalf of the county council.

Lumley Smith, Q.C., and *Macmorran*, for the auditor, shewed cause. The auditor was right in disallowing the payment in question. The costs of the repair of main roads in the hundreds of the county of Lancaster were not costs on account of a "general county purpose" within the meaning of s. 23, sub-s. 2 (iv.), of the Local Government Act, 1888, so that the county council had no power to repay those costs to the general county account out of the exchequer contribution account. Although sub-s. 1 of s. 11 entrusts the entire maintenance of main roads to the county council, and provides that "the execution of this section shall be a general county purpose, and the costs thereof shall be charged to the general county account," those provisions do not, by virtue of sub-s. 13, apply to a county divided into hundreds where a main road, or a part thereof, is declared to be repairable by the hundred, because the effect of sub-s. 13 is to re-enact in, and incorporate with, s. 11, the provisions of s. 20 of the Highways and Locomotives (Amendment) Act, 1878, which enacts, with respect to main roads declared to be repairable by the hundred, that "the expense of repairing the same shall, to the extent to which but for this section the expense, or any contribution towards the expense, of repairing the same would be repayable out of the county rate, be repayable out of a separate rate," to be raised and charged in like manner as the expenses of

repairing the hundred bridges in the same hundred would have been raised and charged. The re-enactment of s. 20 of the Act of 1878 in s. 11 of the Local Government Act, 1888, constitutes, it is submitted, an enactment in terms that, although in counties not divided into hundreds the repair of main roads is a general county purpose, the expense of any contribution to the maintenance of main roads in a hundred, which but for the section would be repayable out of the county rate, shall be a special hundred purpose. These expenses have been paid out of a special rate levied on each hundred. They are not expenses repayable out of the general county rate. The whole area of the county is not taxed for the purpose of paying for the repair of a particular road. The object of dividing the county into hundreds is to ensure that the expenses of the repair of main roads, which are more numerous in some parts of the county than in others, shall fall on the particular part of the county in which the road is. It would work great injustice if it were otherwise. Further, it is clear from the definition of "special county purposes" in sub.-s. 3 of s. 68 of the Local Government Act, 1888, that the expenditure involved in repairing main roads declared to be repairable by the hundred is incurred in respect of "special county purposes," and the expenses therefore are "special expenses" which ought to be carried to the "special county account." It is expenditure which is "by law restricted to a hundred, division, or other limited part of the county," within the very terms of sub-s. 3. The county council had therefore no power to repay that expenditure out of the exchequer contribution account. The sums required to be paid by s. 23 in substitution for local taxation grants are intended to benefit the whole of the county. "General county purposes" are purposes in respect of which the whole area of the county is rated for the general county rate, and do not include the expenses of repairing these main roads in the hundreds.

Smyly, Q.C., and *Mattinson*, for the County Council, supported the rule. By s. 11 of the Local Government Act, 1888, the maintenance of main roads is in terms made a "general county purpose," and that whether s. 20 of the Highways and Locomotives (Amendment) Act, 1878, be put in force in the county

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or not. When the Local Government Act, 1888, was passed, an Act was in contemplation to impose a tax known as the wheel and van tax. Under s. 20, sub-s. 1, of the Act of 1888, the duties to be paid as part of the local taxation account are the duties on the local taxation licences specified in the first schedule to the Act, and amongst those licences are licences for carriages, trade-carts, locomotives, horses and mules, and horse dealers. It was therefore contemplated that, if the Act imposing a wheel and van tax had been passed, the sums produced by that tax would have become part of the exchequer contribution account. Sect. 121 deals with temporary provisions as to grants from the exchequer, and sub-s. 1 provides that during the year ending March 31, 1889, the Commissioners of Inland Revenue shall, from time to time, under the prescribed regulations, pay into the Bank of England (a.) a specified proportion of the sums collected by them in respect of probate duties, and (b.) such sums as may be ascertained, in manner provided by the regulations, to be the proceeds of the sums collected by them during the year in respect of the duties on licences for trade-carts, locomotives, horses, mules, &c. By sub-s. 2 the sums so paid are to be distributed by the Local Government Board (i.) in paying to every county, highway, and other local authority, who had theretofore received out of moneys provided by Parliament a contribution to the cost of roads, sums calculated in like manner as in the previous financial year; and (ii.) if the amount received from the local taxation account from the duties on licences from trade-carts, &c., should exceed the sum so payable to the county, highway, or other local authorities, then the excess is to be divided between the metropolis and quarter sessions boroughs in proportion to their rateable value. Those provisions shew the intention of the legislature that during the transition period the moneys raised by the van and wheel tax should be primarily applied to the purpose of paying the contribution which the Government formerly paid towards the cost of the maintenance of main roads. The Act was passed with the knowledge that at that time half the cost of maintaining main roads in the county of Lancaster was being borne by the hundreds, the other half being contributed by

Government. It would be a strange result if, after the Act came into force, the local taxation licences, which, by s. 23, pass into the exchequer contribution account, could not be taken out of that account in aid of the cost of the repair of main roads, if that cost has been thrown upon the hundred, especially when it is considered that the proposed wheel and van tax was founded on the idea that those who used the roads should contribute to the repair of them. It throws strong light upon the intention of the legislature that the execution of s. 11 should be a "general county purpose," whether the provisions of s. 20 of the Highways and Locomotives (Amendment) Act, 1878, had been applied to some of the main roads in the county or not.

[WRIGHT, J. Sect. 121 of the Local Government Act, 1888, only contains temporary provisions in respect of revenue during the year of transition. It does not seem to have much bearing upon the question we now have to determine.]

The argument made on behalf of the auditor requires an exception to be read into s. 11 with respect to main roads to which the provisions of s. 20 of the Highways and Locomotives (Amendment) Act, 1878, have been applied. No good reason has been shewn for introducing that exception. Sub-s. 13 of s. 11 of the Local Government Act, 1888, provides that s. 20 of the Act of 1878 shall apply as if it were herein re-enacted and in terms made applicable to this section. If so, the re-enactment is governed by sub-s. 1 of s. 11, and therefore the execution of s. 20 with respect to the repair of main roads declared to be repairable by the hundred is made a general county purpose by the express terms of the Act. Sect. 68 does not present the difficulty which has been suggested, because, the repair of main roads having been declared in terms by s. 11 to be a general county purpose, the case is brought within sub-s. 2 of s. 68; and sub-s. 3 does not intend to make the purpose, which has been in terms declared a general county purpose, a special county purpose. The whole of the county of Lancaster is divided into hundreds, and the costs of the repair of main roads in all the hundreds are "costs on account of general county purposes for which the whole of the area of the county is liable to be assessed

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to county contributions," within s. 23, sub-s. 2 (iv.). The words "liable to be assessed" do not mean "which are assessed for the time being," nor need there be an equal assessment all over the county. What has been done by the county council in the present case is to repay to the general county account that which had previously been paid out of that account for the special purposes of the hundred. The sums in question which have been taken from the exchequer contribution account went into an account kept by the treasurer of the county council with the respective hundreds, the rate levied on each hundred being also paid into that account. The effect of the transaction is substantially to pay out of the exchequer contribution account about half the costs of the main roads, that being the proportion formerly allowed from the Government grant. The county council have applied the sums in question to a general county purpose, and it makes no difference to their right to recoup themselves out of the exchequer contribution account, that by arrangement between the county council and the hundreds the sums go to relieve the inhabitants of the respective hundreds from taxation.

WRIGHT, J. I am of opinion that the disallowance by the auditor in this case cannot be sustained. By virtue of the Local Government Act of 1888, s. 3, and s. 11, sub-s. 1, all the main roads in Lancashire are repairable by the county council; their repair is a "general county purpose" by the express language of s. 11, sub-s. 1, and the costs shall be charged to the general county account. But, by virtue of s. 11, sub-s. 13, of the Local Government Act, 1888, and of s. 20 of the Highways and Locomotives (Amendment) Act, 1878, which sub-s. 13 incorporates in s. 11 of the Act of 1888, the justices have the power —which, in this case, they have exercised—to declare in effect that the roads in each hundred shall be maintained at the cost of the hundred; and, the county council being under the Act of 1888 themselves the rating authority for the hundred, specially so made by s. 3, sub-s. 1, they have power under those enactments to levy separately by a separate rating of each hundred the cost of the main roads in that hundred. Then the county say that,

although those costs are levied by unequal rates in different parts of the county, still the whole duty and the whole expense, taken as a whole, is a county purpose, and a general county expense; and, that being so, they are entitled to carry to their own county account under s. 23, sub-s. 2 (iv.)—after satisfying the purposes previously specified—the balance of the exchequer contribution account for the time being. That depends upon whether the maintenance of the highways throughout those hundreds, which extend over the whole area of Lancashire, is a general county purpose within s. 11, sub-s. 1, s. 23, sub-s. 2 (iv.), and s. 68 of the Local Government Act, 1888. I will deal first of all with s. 68. I very much doubt whether that section has any direct bearing upon this question. It provides, first, that all the receipts of the county council, whether for general or special county purposes, shall be carried to the county fund. Then comes a declaration that, "in this Act the expression 'general county purposes' means all purposes declared by this or any other Act to be general county purposes." That is one kind of general county purpose. Another kind is, 'all purposes for contributions to which the county council are for the time being authorised by law to assess the whole area of their administrative county." Then the section proceeds, "and the expression, 'general county account' means the account of the county fund to which the contributions so raised are carried, and any costs incurred for a general county purpose shall be general expenses, and all costs incurred by the county council in the execution of their duties which are not by law made special expenses shall be general expenses." Then special county purposes are thus defined: "In this Act the expression 'special county purposes,' means any purposes from contribution to which any portion of the county is for the time being exempt, and also includes any purposes where the expenditure involved is by law restricted to a hundred, division, or other limited part of the county." Now, taking that section by itself, it seems to me that if the maintenance and repair of main roads are by s. 11 declared to be general county purposes, then you need not read any further; because, if you once bring the case within the first branch of s. 68—namely, "all purposes declared by this Act to

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be general county purposes"—then I think you must read the other branches of the section as applying only to cases where you cannot by aid of the first declaration solve the question whether a particular matter ought to be classified as a general or a special purpose. If you find a declaration in the Act that the matter is a general county purpose, then you need not inquire further. If you do not find that declaration, then you are to apply this test: Is it an expenditure for which the whole area of the county is to be assessed, or is it an expenditure for which a portion only is to be assessed? I do not think that test need be applied here. Having regard to the first part of s. 68, sub-s. 2, I think the purpose is a general county purpose whenever the Act declares it to be so, although if it had not been declared to be so, it would not have been within the definition of general county purposes. Sect. 11, sub-s. 1, says, "The execution of this section shall be a general county purpose, and the costs thereof shall be charged to the general county account." I am of opinion that that provision extends to and includes cases falling within s. 20 of the Highways and Locomotives (Amendment) Act, 1878, which is made part of s. 11 of the Act of 1888 by the 13th sub-section. I think s. 20 is only brought in as a taxation provision which provides for the way in which the money required for general county purposes shall be raised, and does not, in my opinion, make the maintenance of main roads in hundreds a special hundred purpose at all. That being so, the only question is whether s. 23, sub-s. 2 (iv.) applies; and the difficulty there is this. If it is a county purpose, is it within these words: "in repaying to the general county account of the county fund the costs on account of general county purposes for which the whole of the area of the county is liable to be assessed to county contributions?" But for those last words, the main roads would be clearly within that provision, and I do not think that the maintenance and repair of main roads are the less within that provision, merely because the liability to be assessed, which does extend over the whole of the county, is by virtue of the Act of 1878 severed and distributed over the hundred for the purpose of making the amounts leviable unequal in various parts of the county. In substance, it is an assessment over the

whole county, though not an equal assessment over the whole county.

I cannot help thinking that it would be very unjust if any other view were taken—if the mere fact that some of the hundreds were subjected to this proportion of excessive liability by reason of the application of the Act of 1878 were to deprive them, as well as the other hundreds, of the whole benefit to be got by the application of s. 23, sub-s. 2. I may add that we have not entered upon the question of amount, because we are informed that that point was not discussed at the audit. We do not intend to prejudice any conclusion the auditor may arrive at upon that point on another occasion. This decision will not relieve the county from any obligation they may be under by reason of the Highways and Locomotives (Amendment) Act, 1878, to pay the whole costs of the maintenance and repair of any road in any hundred out of the special levy on that hundred. We only say that the county council are not, as between themselves and the quarter sessions boroughs, deprived of the right of receiving a contribution for main road purposes which they had before the division.

COLLINS, J. I am of the same opinion. Mr. Lumley Smith's contention involves this — that no sum whatever will be applicable from the exchequer contribution account towards the expenses of maintenance of main roads in the county of Lancashire. Now, it seems to me that this is a conclusion which is so obviously opposed to the general scheme of the Local Government Act, 1888, that one ought to criticise it very closely in order to see whether we are compelled to arrive at it by the proper construction of the different sections. Sect. 11 of that Act in terms enacts that, "Every road . . . . which is for the time being a main road . . . . shall after the appointed day be wholly maintained and repaired by the council of the county." Then it goes on: "The execution of this section shall be a general county purpose, and the costs thereof shall be charged to the general county account." Therefore, we begin with an emphatic declaration that the expense of main roads is a charge upon the county, and that the execution of the section is to be

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a general county purpose. Now, it so happens that in the county of Lancashire every part of the county is in a hundred. The whole county is subdivided into hundreds, and there are main roads, or some part of a main road, in every hundred; and the question is whether the county council, having applied the funds in its hands towards the expenditure upon main roads in the county distributed over different hundreds, is entitled now to say that a certain fund coming to it from the exchequer contribution account is applicable to recoup that expenditure? It seems to me that it clearly is, and that the difficulties which Mr. Lumley Smith pointed out are by no means insuperable. Now what is the difficulty? The difficulty arises from the fact that by sub-s. 13 of the 11th section of the Local Government Act, 1888, the 20th section of the Highways and Locomotives (Amendment) Act, 1878, "shall apply as if it were herein re-enacted, and in terms made applicable to this section," and that section has by a resolution of the county authority been made applicable in Lancashire—the effect being to substitute the hundred for the county in the matter of recouping the expenditure upon main roads. Now, as was pointed out during the argument, the very sub-section which introduces s. 20 of the Highways and Locomotives (Amendment) Act, 1878, says it is to apply "as if it were herein re-enacted and in terms made applicable to this section;" so that "this section," with the superadded section of the Highways and Locomotives (Amendment) Act, 1878, becomes all one section, and, therefore, we get back to the concluding words of s. 11, sub-s. 1, which say "the execution of this section"—into which we now read the added section of the Highways and Locomotives (Amendment) Act, 1878—"shall be a general county purpose." Now, counsel for the auditor contended, with regard to s. 68, which deals with the appropriation by the county council of the fund coming to it from the exchequer contribution account, that by the definition of general county purposes and special county purposes the application of any part of this fund to recoup the expenditure incurred by the hundreds is in terms taken out of the definition of general county purposes, and constituted a special county purpose. But, to begin with, in sub-s. 2 of s. 68 we have an

express enactment that the expression "general county purposes" means "all purposes declared by this or any other Act to be general county purposes"; and, as I have already pointed out, s. 11 has in terms made the repair of the main roads a general county purpose. But then s. 68 goes on to another definition—"and all purposes for contribution to which the county council are for the time being authorised by law to assess the whole area of their administrative county." With regard even to those words (although it is not necessary to say so, because the case is within the express terms of the earlier part of the section) it seems to me that the whole area of the administrative county is assessed for this expenditure. Although, as my learned brother has pointed out, it is not assessed by an equal rate in every part, still the whole area of Lancashire is broken up into hundreds, and every part of that area is assessable to the contribution for main roads. Now we get to sub-s. 3 of s. 68, which contains the definition of "special county purposes" on which Mr. Lumley Smith mainly relied. The definition is: "In this Act the expression 'special county purposes' means any purposes from contribution to which any portion of the county is for the time being exempt, and also includes any purposes where the expenditure involved is by law restricted to a hundred, division, or other limited part of the county." Now, even if that definition were irreconcilable with what has gone before, I should myself feel that effect should be given to the earlier definition—directly applying, as it does, to a general county purpose. But I am inclined to think that, even accepting the definition of "special county purposes" as being of equal value with the definition of "general county purposes," there is not in this case the inconsistency which has been suggested between them; because, if you come to analyse the definition of "special county purposes," it seems to me it may very well be said that the application of money to the maintenance of roads in the hundred is not strictly within this definition. "Special county purposes" mean any purposes from contribution to which any portion of the county is for the time being exempt. Now, the whole of this county being distributed into hundreds, there is no part of the county which is exempt from contribution to the expenditure

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on main roads. It is true that different parts of the county contribute in different rates; but this case does not seem to me to come within the particular point that is aimed at by the definition of "special county purposes." There may be purposes for which one portion of the county, and one portion only, is liable to contribution, and with respect to which all the other portions of the county are exempt. That is not the case where the whole county is distributed into hundreds, and where every part is liable, though for different amounts and at different rates, according to the great or small class of expenditure involved. Therefore I am not pressed by the inconsistency which I at first thought there was between the definition of "general county purposes" and "special county purposes" in reference to this particular subject-matter of expenditure. That being so, I think the construction of the rest of the Act is easy, and that the exchequer contribution account has been properly applied in relief of the expenditure which has been incurred in maintaining main roads, although those main roads are situate in the hundreds, and although as between the county and the hundred the contribution in relief of the expenditure is assessed primarily upon the hundred. I entirely concur with what has fallen from my learned brother. This order should be made absolute.

Order absolute.

Solicitors for the county council: *Ridsdale & Son.*
Solicitor for the auditor: *M. A. Orgill.*

W. A.

END OF VOL. II.

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2. —— *Milk in course of Delivery under Contract of Sale—Payment of Carriage by Purchaser —"Place of Delivery"—Sale of Food and Drugs Act Amendment Act*, 1879 (42 & 43 *Vict. c.* 30), *s.* 3.] By the Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), s. 3, certain officers therein named "may procure at the place of delivery any sample of any milk in course of delivery to the purchaser or consignee in pursuance of any contract for the sale to such purchaser or consignee of such milk"; and power is given to submit such sample for analysis, and take proceedings as provided by s. 13 of the Sale of Food and Drugs Act, 1875.—The appellant, who lived at C., contracted with a dairy company for the sale to them of the milk from his dairy, to be delivered at London or at such other station as the purchasers should from time to time appoint; the carriage of the milk from C. to be paid by the purchasers. The purchasers appointed H. as a station for the delivery of milk under the contract. The appellant consigned milk from C. to the purchasers at H.; immediately on its arrival at the latter station, and before possession was taken of it by the purchasers, a sample was taken by the respondent, which, upon analysis, was found to be adulterated by the addition of water:—*Held*, that, notwithstanding the provision for payment

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of the carriage by the purchasers, H. was the place of delivery of the milk to the purchasers within the meaning of the section; and the appellant was, therefore, rightly convicted of an offence under the Acts. FILSHIE *v.* EVINGTON - 200

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of the costs to be so paid must be ascertained and stated in and by the award itself, and that otherwise the costs of the reference and award, including the arbitrators' fees, are liable to taxation in the ordinary course. IN RE PREBBLE AND ROBINSON [602

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ARMY AND NAVY—*Billeting of Soldiers—Billet List—Obligation of Victualling-housekeeper to provide Accommodation for Soldiers on the March—Army Act*, 1881 (44 & 45 *Vict. c.* 58), *ss.* 103–110.] There is a statutory obligation under s. 103 of the Army Act, 1881, on the constable in charge at any place mentioned in the route issued to the commanding officer of any portion of Her Majesty's regular forces to give billets for all the officers, soldiers, and horses mentioned in the route, and for whom quarters are required; and the billet list made out under s. 107 by the police authority of any such place is not conclusive as to the number of officers, soldiers, or horses for whom the keeper of a victualling-house shewn in the list may be required to find accommodation on an emergency. Such list merely determines the proportion in which the billets are to be distributed among the keepers of victualling-houses, and does not relieve them from their liability to take in, or otherwise find accommodation for (according to the proportions shewn in the list), any number for whom quarters are required. SHARRATT *v.* SCOTNEY - - - 479

2. —— *Officer—Right to Resign Commission—Conditions of Service — Desertion — Naval Discipline Act*, 1866 (29 & 30 *Vict. c.* 109), *ss.* 19, 87.] An engineer officer in the Royal Navy who has accepted a commission, and is borne on the books of a ship in commission, cannot resign without the consent of the Lords Commissioners of the Admiralty:—*Semble*, under no circumstances is a naval officer entitled to resign his commission except by permission of Her Majesty. HEARSON *v.* CHURCHILL - - - - C. A. 144

ASSIGNMENT OF DEBT—*Equitable Assignment—Notice — Priority — Company — Debentures — Solicitor—Culpable Negligence—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6.] A company issued debentures purporting to charge "its undertaking and all its property, both present and future," and containing a condition that the charge thereby created was "to be a floating security, but so that the company" should "not to be at liberty to create any mortgage or charge in priority to the said debentures." The company subsequently obtained a loan on the security of a mortgage of its interest in a fund due to it from an insurance company. At the time of the negotiation for the loan the solicitor to the mortgagees was aware that debentures had been issued; but, having been led to believe by the managing director of the company that no incumbrance existed which would have priority to the mortgage, he did not ascertain the terms of such debentures. He knew that they were probably at least in the form of "a floating security on the property present or future of the undertaking." This form was usual at the time. Debentures containing words restraining companies from "creating any mortgage or charge in priority" were also in use at the time, but the solicitor to the mortgagees had never seen this form. Notice of the mortgage was given to the insurance company on February 27, 1891. The company afterwards went into liquidation, and the liquidator gave the insurance company notice that the debenture-holders claimed the fund in priority to the mortgagees. An interpleader issue having been directed to determine the question of priority:—*Held*, by Charles, J., that the debentures belonged to the class of documents which may or may not, as opposed to that which necessarily must, affect title; that, therefore, the omission of the solicitor to the mortgagees to inquire as to the terms of the debentures did not, in the circumstances, amount to such gross negligence as to affect the mortgagees with constructive notice of the restrictive clause; and that consequently the mortgagees, having given notice of the mortgage to the insurance company before it received notice of the claim of the debenture-holders, had a prior charge upon the fund. ENGLISH AND SCOTTISH MERCANTILE INVESTMENT TRUST *v.* BRUNTON - - 1

ASSIGNMENT OF DEBT—*continued.*

2. —— *Prior Charges on Debt Assigned—Constructive Notice—Company—Debenture.*] A limited company issued debentures charging all its property both present and future, and containing a condition that the company should not be at liberty to create any mortgage or charge in priority to the debentures. Subsequently the company obtained a loan from the respondents on the security of an assignment to them of its interest in moneys due from an insurance company. When the loan and assignment were effected the respondents' solicitor, who negotiated the matter for them, knew that debentures had been issued, but did not know in what form they were issued, and having been misled by the managing director of the company into believing that there was nothing in the debentures to affect his client's security, he did not require to see the form. The respondents gave notice of the assignment to the insurance company, and subsequently the debenture-holders gave notice to the insurance company of the prior charge created by the debentures. There are three forms in which debentures are usually issued: In two of them the debenture does not, and in the third it does, restrict the company from creating any charge upon its property which shall have priority over the charge created by the debenture:—*Held*, affirming the judgment of Charles, J., that the respondents were not affected with constructive notice of the restrictive clause in the debentures, and therefore that the assignment gave them a charge upon the insurance moneys in priority to the debenture-holders. ENGLISH AND SCOTTISH MERCANTILE INVESTMENT COMPANY, LIMITED *v.* BRUNTON - C. A. 700

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BANKRUPTCY—*Act of Bankruptcy—Bankruptcy Notice—Judgment Debt—Limitation of Amount for which Bankruptcy Notice can be served—Distinction between Payment on Account of Judgment Debt and Counter-claim—Set-off or Cross-demand—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*)—*Bankruptcy Rules*, 1886, *Appendix of Forms, No.* 6 (*Bankruptcy Notice*).] By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4, sub-s. 1 (*g*), a debtor commits an act of bankruptcy, "If a creditor has obtained a final judgment against him for any amount, and, execution thereon not having been stayed, has served on him . . . a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not within the time limited either comply with the requirements of the notice or satisfy the Court that he has a counter-claim, set-off, or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained":—*Held*, that where part of a judgment debt has been paid, the creditor is not entitled to serve a bankruptcy notice in respect of the whole amount of such debt, inasmuch as he could not issue execution in respect of the part which has been paid. In re Child. Ex parte Child - 77

2. —— *Bankruptcy Notice—Irregularity—Obscurity—Notice set aside—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).] Upon an application to set aside a bankruptcy notice it appeared that the notice required the debtor to pay to "H. and others, trustees of the charity known as St. John's Hospital, Northampton, 250*l.*," the amount due upon a final judgment obtained by them against the debtor. The judgment upon which the notice was founded was headed, "H. and others, plaintiffs," and did not anywhere describe the plaintiffs as trustees:—*Held*, that the bankruptcy notice was not in accordance with the terms of the judgment; that it was calculated to perplex the debtor; and that it ought to be set aside. In re Howes. Ex parte Hughes - - - - C. A. 628

3. —— *Bankruptcy Notice—Service out of Jurisdiction—Foreigner resident out of Jurisdiction—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 4, 1 (*g*); 6, 1 (*d*).] *Held*, following *Ex parte Blain* (12 Ch. D. 522) (decided upon the construction of the Bankruptcy Act, 1869), that the Court has no jurisdiction under the Bankruptcy Act, 1883, to allow the service of a bankruptcy notice upon a foreigner out of the jurisdiction. In re Pearson. Ex parte Pearson C. A. 263

4. —— *Fraudulent Preference—Void Bill of Sale—Fresh Bill of Sale given to correct Mistake in Original Bill—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 48.] A debtor shortly before his bankruptcy executed a bill of sale by which he assigned his furniture to his wife to secure advances bonâ fide made by her. Having discovered that the security was void in consequence of its including after-acquired property, he executed, immediately before the bankruptcy, a second bill of sale, assigning the same chattels to his wife, with the intention of correcting the

BANKRUPTCY—*continued.*

error in the first bill; and there was evidence that the debtor believed himself to be under an obligation to give the fresh security:—*Held*, that the mere fact that the grantor gave the substituted security in order to correct a mistake in the original bill of sale did not amount in law to an intention to prefer his wife to his other creditors, but negatived the existence of any intention to prefer within the meaning of s. 48 of the Bankruptcy Act, 1883. In re Tweedale. Ex parte Tweedale - - - - 216

5. —— *Proof of Debt—Loan to Trader—Interest varying with Profits—Postponement of Lender to other Creditors—Partnership Law Amendment Act*, 1865 (28 & 29 *Vict. c.* 86) (*Bovill's Act*), *ss.* 1, 5—*Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *ss.* 2, 3—*Agreement void for Uncertainty.*] In October, 1889, a loan of 4500*l.* was made to a trader, upon the terms of an agreement in writing which provided that he should pay interest on the loan to the lender by two half-yearly payments of 462*l.* 10*s.* for every half-year, and that in case the borrower should be unable to pay to the lender any part of the half-yearly payments upon any part of the 4500*l.*, by reason of the deficiency of the profits of the borrower, "then and upon every such occasion a due allowance shall be made by the lender to the borrower in respect of the same in a fair and reasonable manner." In 1891 the borrower was adjudged a bankrupt. The lender claimed to prove in the bankruptcy for the balance which remained due in respect of the 4500*l.*, which had been in part repaid. The Queen's Bench Division held that the effect of the agreement was to make the rate of interest on the loan "vary with the profits" of the business, within the meaning of s. 1 of Bovill's Act, and that, consequently, the proof could be admitted only for the purpose of receiving dividend after all the other creditors of the bankrupt had been paid in full:—*Held*, by the Court of Appeal, that the agreement was so obscure that it must be treated as void; that it could not, therefore, be said that the rate of interest varied with the profits; and that the lender was entitled to prove in the ordinary way for the unpaid balance of the loan as for money lent. In re Vince. Ex parte Baxter C. A. 478

6. —— *Receiving Order—Judgment Debt—Power of Court to go behind Judgment—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*), *s.* 7—*Partnership*—"*Holding out*" *as Partner—Liability of retiring Partner for Debts of Firm contracted after Dissolution of Partnership.*] Upon the hearing of a creditor's petition for a receiving order against a judgment debtor, the Court of Bankruptcy has power, at the instance of the debtor himself, to go behind the judgment and to inquire into the validity of the debt, even though the debtor has previously applied in the action to set aside the judgment, and his application has been refused, and the refusal affirmed by the Court of Appeal.—A partnership having been dissolved by mutual consent, and proper notices of the dissolution given, the mere fact that the retiring partner allows the continuing partner to carry on business in the old firm name is not such a "holding out" of the former as a partner as

BANKRUPTCY—*continued.*
will render him liable for a debt of the firm contracted after the dissolution with a person who had not dealt with the old firm, and who had no knowledge of the dissolution. IN RE FRASER. EX PARTE CENTRAL BANK OF LONDON C. A. 633

7. —— *Scheme of Arrangement with Creditors—Approval of Court—Right of Board of Trade to appeal against Order of Approval—Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 3 (9)—*Bankruptcy Rules, November* 26, 1890, *r.* 24.] Sect. 3 of the Bankruptcy Act, 1890, provides, by sub-s. 9, that "if any facts are proved on proof of which the Court would be required either to refuse, suspend, or attach conditions to the debtor's discharge were he adjudged bankrupt, the Court shall refuse to approve" a scheme of arrangement with his creditors proposed by the debtor, and accepted by the statutory majority of the creditors, "unless it provides reasonable security for payment of not less than 7*s.* 6*d.* in the pound on all the unsecured debts provable against the debtor's estate":—*Held*, that, even though a proposed scheme provides reasonable security for the payment of 7*s.* 6*d.* in the pound, the Court is not bound to approve the scheme, but has a discretion in the matter.—Whether, if some of the creditors agree to withdraw their claims, and the scheme provides reasonable security for the payment of 7*s.* 6*d.* in the pound to the other unsecured creditors, it can be said that the security extends to all the unsecured debts provable, *Quære.*—Rule 24 of the Bankruptcy Rules of November 26, 1890, provides, that "an appeal to the Court of Appeal shall lie at the instance of the Board of Trade from any order of the Court" of Bankruptcy upon an application for the approval of a scheme:—*Held*, that this rule gives the Board of Trade a right to appeal against an order approving of a scheme, even though the official receiver supported or did not oppose the application for approval. IN RE BURR. EX PARTE BOARD OF TRADE - - - - - C. A. 467

8. —— *Small Bankruptcy—Adjournments of Public Examination—Costs—Taxation by County Court Registrar—Review by Taxing Master of High Court—Appeal—Jurisdiction—The Bankruptcy Rules*, 1886, *rr.* 112, 124—*Appendix, Part II.—The Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 105.] Where the Board of Trade, under rule 124 of the Bankruptcy Rules, 1886, requires a taxation by a county court registrar to be reviewed by the bankruptcy taxing master of the High Court, the taxation of such bankruptcy taxing master may be reviewed by the judge in bankruptcy.—In a case where the assets were certified as not likely to realize 100*l.*, and the public examination of the debtor had been twice adjourned at the instance of the official receiver, the county court registrar, in taxing the bill of costs of the solicitor to the petitioning debtor, allowed 1*l.* 1*s.* for each adjournment in addition to the scale provided in Part II. of the Appendix to the Bankruptcy Rules, 1886:—*Held*, that the solicitor was not entitled to the allowance.—But, *semble*, the county court judge could under s. 105 of the Bankruptcy Act, 1883, have made a special order as to costs. IN RE ALISON. EX PARTE JAYNES - - - - - - 587

BETTING—Public place—"Article used as an instrument of gaming" - - 309
See CRIMINAL LAW. 3.

BILL OF SALE—*Registration—Attornment Clause in Mortgage—New Demise by Mortgagor—Possession by Mortgagee—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 6—*Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 3, 8, 9, 15.] In 1886 W. mortgaged the premises of which he was in occupation by a deed containing an attornment clause, whereby he agreed to become tenant to the mortgagee at a rent equal in amount to the interest on the mortgage debt and payable quarterly; and by the deed a power of distress in case of non-payment was given to the mortgagee.—In 1890 W., by letter written to the mortgagee, acknowledged that he held the premises in his occupation as tenant to the mortgagee at a weekly rent slightly in excess of the interest on the mortgage, admitted arrears of rent to be due, and undertook to deliver up possession of the premises at any time on four weeks' notice.—The mortgage deed and the letter were neither of them registered under the Bills of Sale Acts:—*Held*, by the Court of Appeal (Halsbury, L.C., and Lindley and Kay, L.JJ.), affirming the judgment of Wright, J., that the attornment clause in the mortgage deed and the letter of January, 1890, modifying it, must be deemed to be bills of sale, and were void, under s. 8 of the Act of 1882, for want of registration. GREEN *v.* MARSH - - - - - C. A. 330

2. —— *Validity of—Form in Schedule, Deviation from—Untrue Statement of Consideration—Term for Defeasance of Security—Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 8, 9.] An untrue statement of the consideration for which a bill of sale was given does not constitute a deviation from the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882; and therefore it does not wholly avoid the instrument under s. 9 of that Act, but only renders it void in respect of the personal chattels comprised therein under s. 8.—A collateral agreement between the grantor and grantee of a bill of sale, given by way of security for money advanced, that the bill of sale shall not be made available until the grantee has exhausted certain other securities for the advance, is not a term for the "defeasance" of the security; and the non-insertion of such agreement in the bill of sale does not make it void under s. 9 of the Bills of Sale Act (1878) Amendment Act, 1882, as not being in accordance with the form in the schedule. HESELTINE *v.* SIMMONS - - - C. A. 547

3. —— *"True Owner" of Chattels—Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 5.] The "true owner" of the personal chattels described in a bill of sale at the time of its execution, within the meaning of s. 5 of the Bills of Sale Act, 1882, must be taken to include the person who is the legal owner thereof at that time, irrespective of whether he is also the equitable owner or only trustee for another. IN RE SARL. EX PARTE WILLIAMS - - 591

—— Validity—Fresh bill of sale given to correct mistake in original bill—Bankruptcy—Fraudulent preference - - 216
See BANKRUPTCY. 4.

BILLETING — Soldiers — Billet list—Obligation of victualling-house-keeper to provide accommodation - - - 479
See ARMY AND NAVY.

BOND—Penalty—Writ of summons—Special indorsement - - - - 11
See PRACTICE. 12.

CARRIER—Railway—Undue preference - 229
See RAILWAY.

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See PRACTICE. 2.

CASES—*Adams* v. *Batley* (18 Q. B. D. 625) distinguished - - - 18, 321
See PRACTICE. 9, 10.

—— *Alina, The* (5 Ex. D. 227) considered 184
See COUNTY COURT.

—— *Budd* v. *London and North Western Ry. Co.* (4 Ry. & Can. Ca. 393; 36 L. T. (N.S.) 802; 25 W. R. 752) overruled - 229
See RAILWAY.

—— *Burton-upon-Trent, Mayor, &c., of* v. *Assessment Committee of Burton-upon-Trent* (24 Q. B. D. 197) distinguished - 44
See POOR-RATE.

—— *Corbet Davies, In re* (15 W. R. 46; 15 L. T. 161) not followed - - - 440
See SOLICITOR. 2.

—— *Denaby Main Colliery Co.* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (14 Q. B. D. 209; 11 App. Cas. 97) discussed and explained - - - 229
See RAILWAY.

—— *Harris* v. *Cockermouth and Workington Ry. Co,* (3 C. B. (N.S.) 693) discussed and explained - - - - 229
See RAILWAY.

—— *London and North Western Ry. Co.* v. *Evershed* (3 App. Cas. 1029) discussed and explained - - - 229
See RAILWAY.

—— *London and South Western Ry. Co.* v. *Gomm* (20 Ch. D. 562) distinguished - 88
See LANDS CLAUSES ACTS.

—— *London, Brighton, and South Coast Ry. Co.* v. *Watson* (4 C. P. D. 118) distinguished
See RAILWAY. 2. [595

—— *Metropolitan Board of Works* v. *West Ham* (Law Rep. 6 Q. B. 193) followed 44
See POOR-RATE.

—— *Morris Wilson & Co.* v. *Coventry Machinists Co.* ([1891] Ch. 418) commented on 317
See COPYRIGHT.

—— *Pound* v. *Plumstead Board of Works* (1 Law Rep. 7 Q. B. 183) followed. - 33
See METROPOLIS.

—— *Prentice* v. *London* (Law Rep. 10 C. P. 679) followed - - - - 225
See FRIENDLY SOCIETY.

—— *Reg.* v. *Dolan* (Dears. 436) followed - 597
See CRIMINAL LAW. 6.

—— —— v. *Income Tax (Commissioners of)* (22 Q. B. D. 296; [1891] A. C. 531) followed
See REVENUE. [152

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—— *Reg.* v. *Liverpool (Justices of)* (11 Q. B. D. 638) considered and followed - 421
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—— —— v. *Metropolitan Board of Works* (Law Rep. 4 Q. B. 15) followed - 44
See POOR-RATE.

—— —— v. *St. George* (9 C. & P. 483) overruled
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—— *Thompson, Ex parte* (6 Q. B. 721) followed
See MANDAMUS. [21

—— *Tuther* v. *Caralampi* (21 Q. B. D. 414) distinguished - - - - 11
See PRACTICE. 12.

—— *Williams* v. *Smith* (22 Q. B. D. 134) discussed - - - - 56
See DEFAMATION.

—— *Wilton* v. *Chambers* (7 A. & E. 524) followed
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—— *Woolford's Estate (Trustee of)* v. *Levy* ([1892] 1 Q. B. at p. 776) dissented from
See SHERIFF. [337

CERTIORARI — Costs — Recognizance — Indictment containing several counts — Acquittal on some counts, conviction on others - - - - 181
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CHARTERPARTY—Warranty of—Seaworthiness
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—— Demurrage—Termination of voyage - 555
See SHIP. 2.

—— Excepted perils — Disablement of ship—Duty of shipowner to repair ship and complete voyage - - - 652
See SHIP. 3.

COMMISSION—Offices—Power to resign - 144
See ARMY AND NAVY. 2.

COMPANY—*Winding-up—Appointment of Provisional Liquidator after Winding-up Order—Official Receiver—Companies (Winding-up) Act,* 1890 (53 & 54 *Vict. c.* 63), *ss.* 4, 6.] By the Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), s. 4, sub-s. 1: "On an order being made by the Court for winding up a company the officer hereinafter mentioned shall by virtue of his office become the provisional liquidator of the company, and shall continue to act as such until he or another person becomes liquidator, and is capable of acting as such." Sub-s. 2: "The said officer shall be the official receiver, if any, attached to the Court for bankruptcy purposes, or if there is no such official receiver, then an officer appointed for the purpose by the Board of Trade." Sub-s. 4: "If any vacancy occurs in the office of liquidator of a company, the official receiver shall, by virtue of his office, be the liquidator during the vacancy." Sub-s. 5: "The official receiver may be appointed by the Court provisional liquidator of the company at any time after the presentation of the petition, and before a winding-up order has been made"—*Held,* that after an order for the winding-up of a company has been made, the Court has no power to appoint a provisional liquidator other than the official receiver.—Whether the

COMPANY—*continued.*
Court has power to appoint a provisional liquidator other than the official receiver in the interval between the presentation of the petition and the order for winding up, *quære*. IN RE NORTH WALES GUNPOWDER COMPANY - - - **C. A. 220**

2. —— *Winding-up—Set-off—Mutual Credits or Dealings—Life Insurance Company—Action by Company for Money Lent—Policy not matured at Commencement of Winding-up, but matured at Date of Action—Release—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 38—*Joint Stock Companies Arrangement Act*, 1870 (33 & 34 *Vict. c.* 104), *s.* 2.] The defendant in 1879 effected with the plaintiffs two policies of life insurance for 1000*l.*, each upon his own life, from the date thereof to May 7, 1888, by which policies the plaintiffs contracted that in the event of the defendant being alive on that day they would then pay the moneys assured to the defendant. In April and June, 1887, the defendant obtained two loans of 570*l.* and 600*l.* respectively from the plaintiffs upon mortgage of the policies. In August, 1887, a petition was presented for the winding-up of the plaintiff company, and a provisional liquidator was appointed. The defendant continued to pay to the plaintiffs the premiums upon the policies down to May 7, 1888; but the moneys assured by the policies were never paid to him. In July, 1889, a winding-up order was made. In April, 1890, an arrangement under the Joint Stock Companies Act, 1870, was entered into between the plaintiff company and the Sun Life Assurance Company, whereby it was provided that the policies of the plaintiff company should be transferred to the Sun Company, and that the holders of policies in the plaintiff company should, in full satisfaction of all claims upon the plaintiffs, accept certain reduced payments from the Sun Company. A meeting of policy-holders was summoned under s. 2 of the Act, at which a statutory majority agreed to the arrangement, but the defendant did not himself assent to it; it was in June, 1890, duly sanctioned by the Court. In December, 1890, the plaintiffs brought an action against the defendant to recover the amount of the loans, and the defendant sought to set off against the plaintiffs' claim the sums which, but for the winding-up, would have been payable to him upon the policies:—*Held*, that the defendant was entitled to the set-off.—By s. 2 of the Joint Stock Companies Arrangement Act, 1870, where an arrangement is proposed between a company in the course of being wound up and "the creditors of such company, or any class of such creditors," the Court may order that a meeting of "such creditors or class of creditors" shall be summoned, and if a majority in number, representing three-fourths in value of "such creditors or class of creditors," agree to the arrangement, it shall, if sanctioned by an order of the Court, be binding on "all such creditors or class of creditors, as the case may be," and also on the liquidator and contributories of the company.—The persons summoned to the meeting under the above section were the policy-holders of the company, and no separate meeting was summoned of those whose policies had, as distinct from those whose policies had not, matured:—*Held*, that the insured persons whose

COMPANY—*continued.*
policies had matured formed a distinct class of creditors from those whose policies had not matured; that a separate meeting of such class ought to have been held under the Act in order to make the arrangement binding upon the members of that class; and that the arrangement did not, therefore, operate as a release by the defendant of his claim against the plaintiffs. SOVEREIGN LIFE ASSURANCE COMPANY *v.* DODD - **C. A. 573**

—— Assignment of debt—Holder of debenture—Priority - - - - - **1**
See ASSIGNMENT OF DEBT.

—— Assignment of debt—Holder of debenture—Priority - - - - **700**
See ASSIGNMENT OF DEBT. 2.

—— Contract for purchase of shares—Illegality—Contract to buy shares at a fictitious premium - - - - **724**
See ILLEGALITY.

CONSTRUCTIVE NOTICE—Assignment of chose in action - - - - **700**
See ASSIGNMENT OF DEBT. 2.

CONTRACT—Debts incurred during infancy—Action brought after attaining majority—Bill of exchange given to compromise action—Ratification or new promise **543**
See INFANT.

CONVICTION—Invalidity—Two informations on same facts—Different offences charged—Hearing of second information after decision of first - - - **25**
See JUSTICES.

—— Appeal—Quarter sessions—Deposit instead of recognizance—Power to allow deposit
See JUSTICES. 2. **[29**

—— Insufficient description of offence—Certiorari
See CRIMINAL LAW. 5. **[519**

COPYRIGHT — *Design — Practice — Defendant's Particulars of Objection—Amendment—Discretion of Judge—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57).] The discretion of a judge to allow the amendment of particulars in an action for infringement of a patent or design cannot be affected by any practice as to the terms on which such amendment will be allowed.—*Morris Wilson & Co.* v. *Coventry Machinists Co.* ([1891] 3 Ch. 418) commented on. WOOLLEY *v.* BROAD - - - - - **C. A. 317**

2. —— *Picture—Action for Infringement—Evidence—Production of Original Picture, whether necessary.*] In an action claiming damages under s. 11 of the Art Copyright Act, 1862 (25 & 26 Vict. c. 68), for the infringement of copyright in a picture, the plaintiff did not produce the original picture, but gave evidence that he had seen it, and that a photograph sold by the defendants, which he produced, was directly taken from an engraving which was an exact copy of the original picture, and he produced the engraving:—*Held*, that this evidence was admissible to prove the infringement, and was evidence for the jury that the photograph sold by the defendants was a copy of the original picture. LUCAS *v.* WILLIAMS & SONS - - - - - **C. A. 113**

—— Design—Action for penalty—Interrogatories
See PRACTICE. 10. **[321**

CORPORATION—Duty—Exemption - 152
See REVENUE.

COSTS—Solicitor and client—Past costs—Verbal agreement to pay lump sum—Retainer out of money of client in solicitor's hands - - - - 102
See SOLICITOR AND CLIENT.

—— Taxation on county court scale—Judgment for 50*l.* - - - - 166
See PRACTICE. 3.

—— Jurisdiction—Proceedings on the Crown side of the Queen's Bench Division - 173
See PRACTICE. 2.

—— Certiorari—Recognizance—Indictment containing several counts—Acquittal on some counts, conviction on others 181
See CRIMINAL LAW. 2.

—— County court—Action commenced in High Court—Transfer before trial to county court - - - - - 565
See PRACTICE. 4.

—— Bankruptcy—Taxation by county court registrar—Review by Taxing Master of High Court—Appeal - - 587
See BANKRUPTCY. 8.

—— Arbitration—Taxation of costs of award—Amount of costs not specified in award - - - - 602
See ARBITRATION.

COUNTY COURT—*Jurisdiction—Admiralty—Demurrage—Action by Shipowner—Court in District in which Owner of Vessel resides—"Vessel or Property to which the Cause relates"*—31 & 32 *Vict. c.* 71, *ss.* 3, 21, *sub-s.* 1, 2—32 & 33 *Vict. c.* 51, *ss.* 1, 2, *sub-s.* 1—51 & 52 *Vict. c.* 43, *ss.* 56, 74.] By the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 21, "proceedings in an Admiralty cause shall be commenced: (1.) In the county court having Admiralty jurisdiction within the district of which the vessel or property to which the cause relates is at the commencement of the proceedings; (2.) If the foregoing rule be not applicable, then in the county court having Admiralty jurisdiction in the district of which the owner of the vessel or property to which the cause relates, or his agent in England, resides, or if such owner or agent does not reside within any such district, then in the county court having Admiralty jurisdiction the district whereof is nearest to the place where such owner or agent resides."—By the County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51), which is to be read as one Act with the Act of 1868), s. 2, jurisdiction is given up to 300*l.*: (1.) "As to any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship."—An Admiralty action was commenced by shipowners in the county court having Admiralty jurisdiction, in the district of which they resided, against indorsees of a bill of lading, which incorporated the terms of a charterparty, to recover 40*l.* as demurrage for detention of the ship at the port of discharge. At the commencement of the action the ship was at sea and the cargo to which the bill of lading related was within the district

COUNTY COURT—*continued.*
of another county court having Admiralty jurisdiction.—On an application for a prohibition:—*Held* (by the Court of Appeal, affirming the decision of the Queen's Bench Division), that the claim was within sub-s. 1 of s. 2 of the County Courts Admiralty Jurisdiction Amendment Act, 1869; that the cause related to the vessel not to the cargo; that, the vessel being at sea, sub-s. 1 of s. 21 of the County Courts Admiralty Jurisdiction Act, 1868, was inapplicable, and sub-s. 2 applied; and that the action was therefore rightly commenced in the county court having Admiralty jurisdiction in the district of which the shipowners resided.—*Held*, by the Court of Appeal, that the decision in *The Alina* (5 Ex. D. 227) applies to the case of an action for demurrage upon a bill of lading.—*Held*, by the Queen's Bench Division, that the circumstance that the claim was by the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 56, within the common law jurisdiction of the county court, so that by s. 74 the action might have been commenced in the Court within the district of which the defendants dwelt or carried on their business, did not prevent the County Courts Admiralty Jurisdiction Acts from applying. PUGSLEY & Co. *v.* ROPKINS & Co. - - - - C. A. 184

2. —— *Jurisdiction—Executory Agreement for a Lease—Specific Performance—Action for Rent.*] The defendant entered on premises under an executory agreement for a lease. He subsequently gave six months' notice to quit, as if on a yearly tenancy, and left the premises. An action was brought in the county court for a quarter's rent, accruing due after the defendant had given up possession. The value of the premises exceeded 500*l.*, so that the judge had no jurisdiction to decree specific performance of the agreement; but he was of opinion that it was a case in which specific performance would be decreed, and that he was, therefore, bound to treat the defendant as tenant under the terms of the agreement, and he gave judgment for the plaintiff.—On appeal:—*Held* (affirming the judgment of the Queen's Bench Division), that the equitable doctrine that a person who enters under an executory agreement for a lease is to be treated as in under the terms of the agreement, can only be applied where the Court in which the action is brought has concurrent jurisdiction in law and equity, and that the plaintiff could not recover in the action. FOSTER *v.* REEVES - - C. A. 255

3. —— *Attachment of Debts—Discovery in aid of Execution—Examination of Married Woman—County Court Rules*, 1892, *Order* XXV., *r.* 47.] Where a judgment or order has been obtained in a county court against a married woman for the recovery or payment of money, the judge has power to make an order for her examination as to her separate estate. COUNTESS OF AYLESFORD *v.* GREAT WESTERN RAILWAY COMPANY - 626

—— Appeal—Rivers Pollution Prevention Act
See LOCAL GOVERNMENT. 2. [274

—— Action commenced in High Court—Transfer before trial to County Court—Jurisdiction after transfer—Costs - 565
See PRACTICE. 4.

CRIMINAL LAW—*Attempt to discharge Loaded Arms—Evidence for the Jury—24 & 25 Vict. c. 100, s. 18.*] On the trial of an indictment under 24 & 25 Vict. c. 100, s. 18, which enacts that whosoever shall unlawfully and maliciously, "by drawing a trigger or in any other manner," attempt to discharge any kind of loaded arms at any person with intent to do grievous bodily harm, shall be guilty of felony, it was proved that the prisoner drew from his pocket a loaded revolver and pointed it towards his mother. His wrists were seized by bystanders as he was raising the pistol, and after a struggle it was taken from him. During the struggle his finger and thumb were seen fumbling about the revolver, which cocked automatically when the trigger was pulled:—*Held*, that there was evidence upon which the prisoner could properly be convicted of an attempt to discharge the revolver within the meaning of the statute.—*Reg.* v. *St. George* (9 C. & P. 483) overruled. THE QUEEN *v.* DUCKWORTH - - - - - - - 83

2. —— *Practice—Costs—Indictment containing several Counts—Charge of several Misdemeanors—Certiorari—Removal of Indictment—Recognizance—Acquittal on some Counts, Conviction on others — "Acquitted upon the Indictment" — 16 & 17 Vict. c. 30, s. 5.*] An indictment containing several counts, charging different misdemeanors, was removed into the High Court by certiorari, the prosecutors entering into a recognizance, under 16 & 17 Vict. c. 30, s. 5, upon condition to pay to the defendant, in case she should be acquitted upon the indictment, her costs incurred subsequent to the removal. The defendant was convicted on some of the counts, and acquitted on others.—On a rule to tax the costs to be paid by the prosecutors to the defendant in respect of the counts on which she had been acquitted:—*Held*, that the defendant had not been "acquitted upon the indictment," within the meaning of the recognizance, and therefore was not entitled to costs. THE QUEEN *v.* BAYARD [181

3. —— *Vagrant Acts—Gaming—Betting in a Public Place—Article used as an Instrument of Gaming—"At any Game or pretended Game of Chance"—36 & 37 Vict. c. 38, s. 3.*] In order to convict, under 36 & 37 Vict. c. 38, s. 3, of the offence of playing or betting by way of wagering or gaming, in a public place, with a coin, card, token, or other article used as an instrument or means of wagering or gaming, it is necessary to allege and prove that the defendant was guilty of wagering or gaming at some game or pretended game of chance. RIDGEWAY *v.* FARNDALE 309

4. —— *Larceny—Money paid or deposited under Contract induced by Fraud—Property remaining in Depositor—Possession obtained by Fraud—Larceny by a Trick.*] Where the owner of money or goods parts with the possession of them under a contract induced by fraud, but does not intend to part with the property in them until the other party to the contract has fulfilled his part of the bargain, the person so fraudulently obtaining possession of the money or goods may be convicted of larceny.—The prisoner agreed at a fair to sell a horse to the prosecutor for 23*l.*, of which 8*l.* was to be paid to the prisoner at once, and the remainder upon delivery of the horse. The prosecutor handed 8*l.* to the prisoner, who signed a receipt for the money; by the receipt it was stated that the balance was to be paid upon delivery. The prisoner never delivered the horse to the prosecutor, but caused it to be removed from the fair under circumstances from which the jury inferred that he had never intended to deliver it:—*Held*, that the prisoner was rightly convicted of larceny by a trick. THE QUEEN *v.* RUSSETT - - - - - - 312

5. —— *Certiorari — Conviction insufficiently describing Offence—Conspiracy and Protection of Property Act*, 1875 (38 & 39 *Vict. c.* 86), *s.* 7.] By s. 7 of the Conspiracy and Protection of Property Act, 1875, a penalty is imposed on any person who wrongfully and without legal authority, "with a view to compel any other person to abstain from doing . . . . any act which such other person has a legal right to do," follows him in a disorderly manner, with two or more other persons, in any street or road.—The defendant was summarily convicted under the section, the conviction stating that he wrongfully and without legal authority followed the informant in a disorderly manner, with two or more other persons, in certain streets, "with a view to compel him to abstain from doing acts which he had a legal right to do:"—*Held*, that these acts ought to have been specified in the conviction, and that it must be quashed. THE QUEEN *v.* MCKENZIE [519

6. —— *Receiving—Resumption of Possession by Owner after Theft and before Receiving.*] A parcel was handed to the prosecutors, a firm of carriers, for conveyance to the consignees. While in the prosecutors' depot, a servant of the prosecutors removed the parcel to a different part of the premises, and placed upon it a label addressed to the prisoners by a name by which they were known and at a house where they resided. The superintendent of the prosecutors' business, on receipt of information as to this, and after inspection of the parcel, directed it to be replaced in the place to which the thief had removed it, and to be sent, with a special delivery-sheet, in a van accompanied by two detectives, to the address shewn on the label. At that address it was received by the prisoners under circumstances which clearly shewed knowledge on their part that it had been stolen. The property in the parcel was laid in the indictment in the carriers, and an offer to amend the indictment by substituting the names of the consignees was declined. The prosecutors' servant pleaded guilty to a count for larceny in the same indictment:—*Held*, that as the person in whom the property was laid had resumed possession of the stolen property before its receipt by the prisoners, it had then ceased to be stolen property, and the prisoners could not be convicted of receiving it knowing it to have been stolen.—*Reg.* v. *Dolan* (Dears. 436) followed. THE QUEEN *v.* VILLENSKY [C. C. R. 597

7. —— *Offences against the Person—Carnal Knowledge of Girl under Thirteen—Male under Fourteen—Criminal Law Amendment Act*, 1885 (48 & 49 *Vict. c.* 69), *s.* 4.] A male under the

CRIMINAL LAW—*continued.*
age of fourteen years cannot be convicted under s. 4 of the Criminal Law Amendment Act, 1885, of the offence of carnal knowledge of a girl under the age of thirteen years. THE QUEEN *v.* WAITE [C. C. R. 600

CROWN PRACTICE—Proceedings on the Crown side of the Queen's Bench Division—Costs—Jurisdiction - - 173
See PRACTICE. 2.

—— Certiorari — Recognizance — Costs—Indictment containing several counts—Acquittal on some counts, conviction on others - - - - 181
See CRIMINAL LAW. 2.

DEBENTURE — Company—Assignment of debt —Priority of holder of debenture 1, 700
See ASSIGNMENT OF DEBT. 1, 2.

DEFAMATION — *Libel — Privilege — Register of County Court Judgments, Extract from—Trade Protection Society.*] The publication of a mere copy of what is contained in a register of judgments, kept in pursuance of an Act of Parliament, and which by law the public are entitled to inspect, is privileged.—An extract from the register of county court judgments was published in a trade protection society's journal, stating that judgments had been obtained in the county court against the persons named, among whom was the plaintiff. A note was appended to the effect that the statement was taken from the register of county court judgments, but that no distinction was made in the register between actions for debt or damages or properly disputed cases, neither was it known which of the judgments remained unpaid, but it was probable that a large proportion of them had been settled or paid. The plaintiff brought an action for libel alleging by way of innuendo that the statement meant that a judgment had been obtained against him in the county court, which remained unsatisfied, and that he was insolvent and a person to whom credit ought not to be given:—*Held*, that, having regard to the note appended, the statement complained of was incapable of the meaning alleged by the innuendo, and that such statement being merely an extract from the register of county court judgments, a document which by law was open to public inspection, the publication was privileged, and in the absence of evidence of malice the action could not be maintained.—*Williams* v. *Smith* (22 Q. B. D. 134) discussed. SEARLES *v.* SCARLETT - C. A. 56

2. —— *Words not Actionable per se—Publication of Falsehoods about a Business—Special Damage—Evidence—General Loss of Business.*] In an action for words not actionable per se, but constituting an untrue statement maliciously published about the plaintiff's business, which statement is intended or reasonably likely to produce, and in the ordinary course of things does produce, a general loss of business as distinct from the loss of particular known customers, evidence of such general loss of business is admissible, and sufficient to support the action. RATCLIFFE *v.* EVANS - - - C. A. 524

DEMURRAGE — Charterparty — Termination of voyage - - - - 555
See SHIP. 2.

DISCOVERY—Documents—Infant - 178
See PRACTICE. 6.

—— Principal resident abroad—Action in name of agent—Staying action till discovery made - - - - 324
See PRACTICE. 8.

DRUNKENNESS — Permitting drunkenness on licensed premises—Evidence - 134
See LICENSING ACTS.

EDUCATION—School board—Metropolis—Building Acts—Compulsory purchase of land by school board - - - 606
See METROPOLIS. 5.

EMPLOYERS' LIABILITY ACT—*Master and Servant—Way used in Business of Employer—Defect in Condition of Way—Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-s.* 1.] The plaintiff was employed by the defendants as a workman in a large workshop where a part of their business was carried on. In the workshop was a catchpit generally covered with a lid. The lid was removed for a temporary purpose, and the plaintiff in passing from one part of the workshop to another in the course of his business fell into the catchpit and was injured. In an action by the plaintiff against the defendants:—*Held* (differing from the judgment of the Queen's Bench Division), that the floor of the shop where the plaintiff was passing was a way within the meaning of the Employers' Liability Act, 1880, s. 1, sub-s. 1; but *Held*, also, that the removal of the cover from the well did not constitute a defect in the condition of the way within the meaning of the section, and that consequently the defendants were not liable. WILLETTS *v.* WATT & Co. - - - - C. A. 92

ESTATE DUTY—Succession duty - - 684
See REVENUE. 3.

EVIDENCE — Criminal law — Attempt to discharge loaded arms - - 83
See CRIMINAL LAW.

—— Action for infringement of copyright of picture—Production of original picture whether necessary - - - 113
See COPYRIGHT. 2.

EXECUTION—Concurrent writs of fi. fa.—Penalty under Sheriffs Act, 1887—Overcharge by mistake—Demand—Conditions precedent - - - - 337
See SHERIFF.

—— Sheriff—Wrongful act of bailiff—Liability of sheriff to penalty - - 355
See SHERIFF. 2.

EXECUTOR—Probate duty—Bonâ fide mistake in valuation—Liability - - 289
See REVENUE. 2.

—— Damages — Personal tort — Proceedings before justices — Highway — Extraordinary expenses - - - 515
See HIGHWAY.

FRAUDULENT PREFERENCE — Bankruptcy — Fresh bill of sale given to correct bill of sale in original bill - - 216
See BANKRUPTCY. 4.

FRIENDLY SOCIETY — *Jurisdiction — Dispute between Member and Society—Dispute as to whether a Person is entitled to be a Member—Friendly Societies Act*, 1875 (38 & 39 *Vict. c.* 60), *s.* 22.] By s. 22 of the Friendly Societies Act, 1875, "Every dispute between a member, or person claiming through a member or under the rules of a registered society, and the society or an officer thereof, shall be decided in manner directed by the rules of the society."—The plaintiff was expelled from a friendly society, the rules of which directed that disputes between a member and the officers should be decided by justices. He applied for an injunction to restrain the society, its members and officers, from excluding him:—*Held*, that the Act and rules applied only to disputes arising between members and the society, and did not include a dispute as to whether a person who had been expelled from the society was entitled to be reinstated, and therefore the Court had jurisdiction to grant an injunction. — *Prentice* v. *London* (Law Rep. 10 C. P. 679) followed. WILLIS *v.* WELLS - - - - 225

GAMING — *Contract by way of Wagering—Insurance against Disease—8 & 9 Vict. c.* 109—14 *Geo.* 3, *c.* 48, *s.* 2.] The defendants, the proprietors of a certain medical preparation called "The Carbolic Smoke Ball," issued an advertisement in which they promised to pay 100*l.* to any person who contracted the influenza after having used one of their smoke balls, in a certain specified manner and for a certain specified period. The plaintiff, upon the faith of the advertisement, purchased one of the defendants' smoke balls, and used it in the manner and for the period specified, but nevertheless contracted the influenza:—*Held*, that the above facts established a contract by the defendants to pay the plaintiff 100*l.* in the event which happened; that such contract was neither a contract by way of wagering within 8 & 9 Vict. c. 109, nor a policy within 14 Geo. 3, c. 48, s. 2; and that the plaintiff was entitled to recover. CARLILL *v.* CARBOLIC SMOKE BALL COMPANY - - - - 484

—— Betting in a public place—Article used as an instrument of gaming—"At any game or pretended game of chance" *See* CRIMINAL LAW. 3. [309

HIGHWAY—*Repair—Extraordinary Expenses—Extraordinary Traffic — Liability — Executor — Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 23.] The proceedings which may be taken by a road authority, under s. 23 of the Highways and Locomotives (Amendment) Act, 1878, to recover in a summary manner the expenses of repairing a highway caused by extraordinary traffic thereon, are in the nature of an action for a personal tort, so that such proceedings cannot be taken against the executor of a person by whose order the extraordinary traffic was conducted. STORY *v.* SHEARD - - - - - 515

ILLEGALITY — *Stock Exchange — Contract for Purchase of Shares—Agreement to buy Shares at a fictitious Premium — Rigging the Market — Conspiracy—Action to recover Money paid on Purchase.*] An agreement between two or more to purchase shares in a company in order to induce persons who might thereafter purchase shares in such company to believe, contrary to the fact, that there was a bonâ fide market for its shares, and that the shares were at a real premium, is an illegal transaction and may be made the subject of an indictment for conspiracy, and no action can be maintained in respect of such agreement or purchase of shares.—The plaintiff brought an action against the defendants who were stockbrokers, through whom he had purchased shares in a projected company, to obtain rescission of the contract for the purchase of such shares, and to recover back the purchase-money which he had paid in respect of them to the defendants, on the ground that the defendants, while acting as the plaintiff's brokers, had delivered their own shares to him instead of purchasing them upon the Stock Exchange. At the trial it appeared upon the plaintiff's own case that the money sought to be recovered had been paid by the plaintiff in pursuance of an agreement between him and one of the defendants by which such defendant was with the money to purchase upon the Stock Exchange a number of shares in the projected company at a premium with the sole object of inducing the public to believe that there was a real market for the shares and that they were at a real premium, which, in fact, as the plaintiffs and defendants well knew, they were not:—*Held*, that the action was based upon an illegal contract, and could not be maintained. SCOTT *v.* BROWN, DOERING, MCNAB & CO. SLAUGHTER & MAY *v.* BROWN, DOERING, MCNAB & CO. - - C. A. 724

—— Advertisement — Contract — Insurance against disease - - - 484
See GAMING.

INCLOSURE — Allotment — Corporation—Application in manner prescribed by Act of Parliament—Charitable purpose - 152
See REVENUE.

INFANT — *Contract — Debt incurred during Infancy—Action brought after attaining Majority—Bill of Exchange given to compromise Action—Ratification or New Promise—Infants' Relief Act*, 1874 (37 & 38 *Vict. c.* 62), *s.* 2.] By the Infants' Relief Act, 1874 (37 & 38 Vict. c. 62), s. 2, "no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age."—The defendant, during infancy, became, jointly with two others, indebted to a firm of brokers, who brought an action against them after the defendant had attained his majority to recover the amount of the debt. The action was compromised on the terms that defendant should give two acceptances for 50*l.* each, and one of his co-defendants an acceptance for 80*l.*, the other defendant being discharged from the action. One of the bills given by the defendant to the

INFANT—*continued.*
brokers was indorsed by the latter to the plaintiff, who had acted as their solicitor in the action, and who took the bill with notice of the circumstances under which it was given:—*Held*, that the transaction merely amounted to a promise made by the defendant after full age to pay a debt contracted during infancy, or to a ratification made by him after full age of a promise or contract made during infancy; and was, therefore, avoided by the operation of s. 2 of the Infants' Relief Act, 1874. SMITH *v.* KING - - - 543
—— Discovery—Documents - - 178
See PRACTICE. 6.

INFORMATION — Justices — Practice—Two informations on same facts — Different offences charged — Hearing of second information after decision of first - 25
See JUSTICES.

INN—Licence—Change of occupation—Refusal of licence to new tenant — Expiration of licence—Subsequent application for licence by second new tenant - 421
See LICENSING ACTS. 2.
—— Licence, application for renewal of—Notice of intention to oppose—Person holding temporary authority to carry on business under 5 & 6 Vict. c. 44, s. 1 - 428
See LICENSING ACTS. 3.

INSURANCE—*Accident—Principal and Agent—Knowledge of Agent imputed to Principal—Misstatement in Proposal.*] B. effected an insurance with the defendant company through their agent against accidental injury. The proposal for the insurance contained a statement by the assured that he had no physical infirmity, and that there were no circumstances that rendered him peculiarly liable to accidents, and it was agreed that the proposal should form the basis of the contract between him and the company. By the terms of the policy, the company agreed to pay the insured 500*l.* on permanent total disablement, and 250*l.* on permanent partial disablement — the policy stating that by permanent total disablement was meant, inter alia, "the complete and irrecoverable loss of sight to both eyes," and by permanent partial disablement was meant, inter alia, "the complete and irrecoverable loss of sight in one eye."—At the time when he signed the proposal for the insurance the assured had lost the sight of one eye, a fact of which the defendants' agent was aware, though he did not communicate it to the defendants.—The assured during the currency of the policy met with an accident, which resulted in the complete loss of sight in his other eye, so that he became permanently blind:—*Held*, that it must be taken, first, that the assured had sustained a complete loss of sight to both eyes within the meaning of the policy; secondly, that the knowledge of the defendants' agent was under the circumstances the knowledge of the defendants, and that they were liable on the policy for 500*l.* BAWDEN *v.* THE LONDON, EDINBURGH, AND GLASGOW ASSURANCE COMPANY - - - - C. A. 534
—— Contract by way of wagering—Person interested - - - - 484
See GAMING.

INSURANCE, LIFE—Company—Winding-up—Mutual credits or dealings - 573
See COMPANY. 2.

INTEREST—Writ of summons—Special indorsement - - - - - 14
See PRACTICE. 13.

INTERROGATORIES—Action for penalties 18
See PRACTICE. 9.
—— Action for penalties - - - 321
See PRACTICE. 10.
—— Libel—Evidence in mitigation of damages
See PRACTICE. 7. [319

JOINT TORTFEASORS—Discharge of one—Reservation of claim against the other—Covenant not to sue - - 511
See RELEASE.

JUDGMENT—Default of defence—Jurisdiction of Court to order interlocutory judgment
See PRACTICE. 5. [622

JUDGMENT CREDITOR — Bankruptcy notice—Judgment debt—Part payment - 77
See BANKRUPTCY.
—— Bankruptcy notice—Power of Court to go behind judgment - - - 633
See BANKRUPTCY. 6.

JURISDICTION — *Trespass — Land in Foreign Country—Defendant within Jurisdiction—Declaration of Title to Land in Foreign Country—Plea to Jurisdiction.*] Local venue having been abolished by the Judicature Rules, the High Court has jurisdiction to entertain an action for damages in respect of trespass to land situate in a foreign country against a defendant who is within the jurisdiction.—So *held*, by Fry and Lopes, L.JJ., Lord Esher, M.R., dissenting.—*Held*, by the Queen's Bench Division (Lawrence and Wright, JJ.), first, that the High Court will not entertain an action for directly determining the title to land in a foreign country.—Secondly, that a plea to the jurisdiction need not allege the existence of a competent Court abroad, when the ground of the plea is a want of jurisdiction in the Courts of this country generally. COMPANHIA DE MOCAMBIQUE *v.* BRITISH SOUTH AFRICA COMPANY. DE SOUSA *v.* SAME - - C. A. 358
—— County Court—Admiralty—"Vessel or property to which the cause relates" 184
See COUNTY COURT.
—— Bankruptcy — Foreigner resident out of jurisdiction — Bankruptcy notice — Service out of jurisdiction - - 263
See BANKRUPTCY. 3.

JUSTICES—*Petty Sessions—Two Informations on same Facts—Different Offences charged—Hearing of Second Information before Decision of First—Illegality of Conviction.*] Two informations were preferred against the appellant under the Indecent Advertisements Act, 1889 (52 & 53 Vict. c. 18); the first, under s. 4, charging him with delivering to a certain person indecent advertisements, with intent that the same should be delivered or exhibited; and the second, under s. 3, charging him with aiding, abetting, counselling, and procuring the same person in the commission of the offence of exhibiting the same

JUSTICES—*continued.*

advertisements. The facts relating to the two charges were the same. After hearing the first information, the justices proceeded with and heard the second; and after the second had been heard, the appellant was convicted of the offence charged in the first. He was also convicted on the second information:—*Held*, that each case ought to have been decided on the evidence given with relation to the particular charge, and therefore the justices were wrong in hearing the evidence on the second information before deciding on the first, and both convictions were bad. HAMILTON *v.* WALKER - - - - 25

2. —— *Quarter Sessions—Appeal—Court of Summary Jurisdiction—Appeal to Quarter Sessions—Deposit instead of Recognizance—Power to allow Deposit—"Court before whom Appellant appears to enter into Recognizance"—Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 31, *sub-ss.* 2, 3.] By the Summary Jurisdiction Act, 1879, s. 31, sub-s. 2, the appellant from an order of a court of summary jurisdiction shall, within seven days after the decision, give notice in writing of his intention to appeal, and of the general grounds of such appeal.—By sub-sect. 3, the appellant shall, within three days after giving notice of appeal, enter into a recognizance, or "may, if the court of summary jurisdiction before whom the appellant appears to enter into a recognizance think it expedient," make a deposit instead.—A court of summary jurisdiction made an order, and, on the same day, gave leave to the person affected by the order, who intended to appeal, to make a deposit, and fixed the amount. Four days later, notice of appeal was given. The court of quarter sessions refused to hear the appeal.—On application for a mandamus to compel the sessions to hear the appeal:—*Held*, that the intention of s. 31, sub-ss. 2, 3, of the Summary Jurisdiction Act, 1879, was that the Court allowing a deposit should have the notice of appeal before them, and the allowance before the notice of appeal had been given was invalid, and therefore the refusal to hear the appeal was right. THE QUEEN *v.* THE JUSTICES OF ANGLESEY - 29

3. —— *Quarter Sessions — Appeal against Summary Conviction—Grounds of Appeal—Excessive Punishment—Jurisdiction to quash Conviction.*] On an appeal against a summary conviction the only ground stated in the notice of appeal was that the punishment inflicted was excessive. The respondents did not appear at the hearing; and, upon the appellant duly proving his notices of appeal, the court of quarter sessions quashed the conviction:—*Held*, that the Court had jurisdiction to quash the conviction, and had taken the proper course. THE QUEEN *v.* THE JUSTICES OF SURREY AND BELL - 719

LANDLORD AND TENANT—Agreement for lease—Specific performance—County court—Jurisdiction - - - 255
See COUNTY COURT. 2.

LANDS CLAUSES ACTS—*Railway Company—Sale of Superfluous Lands—Covenant to resell a Portion—Invalidity of Sale—Extent of—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 127.]

LANDS CLAUSES ACTS—*continued.*

A railway company sold to a purchaser for a lump sum a plot of land which was not required by them for the purposes of their undertaking. The conveyance contained a covenant by the purchaser to resell a certain defined portion of such land to the company whenever he might be required by them to do so:—*Held*, by Cave, J., that although such covenant to resell, being in contravention of s. 127 of the Lands Clauses Consolidation Act, vitiated the sale of the portion of the land to which the covenant related, it did not affect the validity of the sale of the other portion.—*London and South Western Ry. Co.* v. *Gomm* (20 Ch. D. 562) distinguished. RAY *v.* WALKER - - - - - 88

LARCENY—Money paid or deposited under contract induced by fraud - - 312
See CRIMINAL LAW. 4.

LIBEL—Privilege—Register of county court judgments, extract from—Trade protection society - - - - 56
See DEFAMATION.

—— Discovery—Interrogatories - - 319
See PRACTICE. 7.

LICENSING ACTS—*Offences—Permitting Drunkenness on Premises—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 13.] It is not necessary, in order to constitute the offence of permitting drunkenness on licensed premises within the meaning of s. 13 of the Licensing Act, 1872, to shew that a drunken person was served with drink on the premises. HOPE *v.* WARBURTON - - 134

2. —— *Licence—Inn—Change of Occupation—Refusal of Renewal to New Tenant—Expiration of Licence—Subsequent Application for Licence by Second New Tenant—Jurisdiction of Justices—9 Geo. 4, c. 61, s. 14.*] By 9 Geo. 4, c. 61, s. 14: "If any person duly licensed under this Act shall before the expiration of such licence . . . . remove from or yield up the possession of the house specified in such licence; or if the occupier of any such house, being about to quit the same, shall have wilfully omitted or shall have neglected to apply, at the general annual licensing meeting or at any adjournment thereof, for a licence to continue to sell exciseable liquors by retail, to be drunk or consumed in such house, it shall be lawful for the justices assembled as aforesaid at a special session . . . . to grant to . . . . any new tenant or occupier of any house having so become unoccupied . . . . a licence to sell exciseable liquors by retail . . . ."—The licence-holder of an inn yielded up possession of the premises in December, 1890; at a special session in May, 1891, a new tenant unsuccessfully applied for a transfer of the licence; at the adjourned general annual licensing meeting in September, 1891, another new tenant unsuccessfully applied for a renewal of the licence; neither of the applicants appealed to quarter sessions. The then current licence expired on October 10, 1891. In March, 1892, the appellant, who had become tenant of the house, applied, under 9 Geo. 4, c. 61, s. 14, for a licence:—*Held*, that the justices had jurisdiction to grant the application.—*Reg.* v. *Justices of Liverpool* (11 Q. B. D. 638) considered and followed. BALDWIN *v.* JUSTICES OF DOVER 421

LICENSING ACTS—*continued.*

3. —— *Licence, application for renewal of—Notice of Intention to oppose—Person holding temporary Authority to carry on Business under* 5 & 6 *Vict. c.* 44, *s.* 1—*Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 42—*Special Case stated by Licensing Justices—Proper Party to be Respondent—Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 33.] Sect. 42 of the Licensing Act, 1872, provides that, "where a licensed person applies for the renewal of his licence . . . . the justices shall not entertain any objection to the renewal of such licence, or take any evidence with respect to the renewal thereof, unless written notice of an intention to oppose the renewal of such licence has been served on such holder not less than seven days before the commencement of the general annual licensing meeting."—The occupier of licensed premises being about to leave the same, an interim authority was granted to the appellant under 5 & 6 Vict. c. 44, s. 1, to carry on the business until the next special session for transfer of licences. Such session and the general annual licensing meeting being held simultaneously, the appellant made applications thereat for a transfer of the licence under 9 Geo. 4, c. 61, s. 14, and also for a renewal of the licence. Both applications were refused by the justices, because they were not satisfied as to the appellant's good character. No notice of intention to oppose the renewal of the licence had been served upon the appellant:—*Held*, that the appellant was not a "licensed person" applying for a renewal of "his" licence within the meaning of the above-mentioned section, and therefore was not entitled to the notice therein mentioned:—*Held*, also, that where a case was stated under 42 & 43 Vict. c. 49, s. 33, in reference to the refusal of a licence, the superintendent of police of the division, who had appeared to oppose the licence before the justices, and to whom notice in writing of the appeal had been given by the appellant, in accordance with 20 & 21 Vict. c. 43, s. 2, was rightly constituted respondent. PRICE *v.* JAMES - **C. A. 428**

LOCAL GOVERNMENT — *Offences.—Nuisance—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 42—"*House Refuse*"—*Clinkers from Furnaces in Steam Laundry.*] Clinkers produced in the furnaces of boilers belonging to a steam laundry, used to generate steam for the purpose principally of heating the water used in the business, but also for the purpose of warming the laundry, are not "house refuse" within the meaning of s. 42 of the Public Health Act, 1875, and therefore a local authority which has undertaken the removal of house refuse within its district is not bound to remove them.—*Per* Charles, J.: The definition of "house" in s. 4 of the Public Health Act, 1875, is not to be read into s. 42 of that Act, and therefore such a steam laundry, although containing a dwelling-house for the manageress and for the clerk in charge, is not a "house" for the purpose of the removal of "house refuse" under the latter section. LONDON AND PROVINCIAL LAUNDRY COMPANY *v.* WILLESDEN LOCAL BOARD - **271**

2. —— *Public Health—River, pollution of—Sewer, drainage flowing through into Stream—"Person who causes Sewage to flow into Stream"—Conjoint default of Owner of Premises and Local*

LOCAL GOVERNMENT—*continued.*

Authority—Discretion—Rivers Pollution Prevention Act, 1876 (39 & 40 *Vict. c.* 75), *ss.* 3, 10, 11—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 13, 15, 17, 19, 27—*Practice—County Court Appeal, mode of bringing—County Courts Act*, 1888 (51 & 52 *Vict.* 43), *ss.* 120–124.] The defendants erected water-closets on their premises, the drains from which they connected with two small natural water-courses, which had become sewers, and were, therefore, vested in the plaintiffs, a local board. Through these sewers the sewage from the water-closets flowed by natural gravitation into a larger stream. The defendants were entitled as against the plaintiffs to connect the drains from their water-closets with these sewers under s. 21 of the Public Health Act, 1875; but the plaintiffs had not sanctioned their so doing. The plaintiffs under s. 10 of the Rivers Pollution Prevention Act, 1876, applied to a county court for and obtained an order to restrain the defendants from causing the sewage to flow into the stream. On appeal against this order, it appeared to the Court that, upon the facts of the case, the plaintiffs were themselves in default in not having made any provision for dealing with the sewage in these sewers, as required by the Public Health Act, 1875:—*Held*, that the making of the order was discretionary, and although the defendants had offended against the Rivers Pollution Prevention Act, 1876, as a matter of discretion, under the circumstances of the case, an order ought not to be made against them at the instance of the plaintiffs, who were themselves offenders against that Act, and were seeking to avoid performance of their duty under the Public Health Act, 1875:—*Held*, also, that an appeal on the above-mentioned ground was correctly brought by way of motion.—By Bowen, L.J., and A. L. Smith, L.J.: An appeal from a county court on the merits under s. 11 of the Rivers Pollution Prevention Act is, by s. 124 of the County Courts Act, 1888, brought within the operation of s. 120 of that Act. KIRKHEATON DISTRICT LOCAL BOARD *v.* AINLEY, SONS & CO. - - **C. A. 274**

3. —— *County Council—Main Roads—Costs of Repair of Main Roads in Counties divided into Hundreds—Exchequer Contribution Account—Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 20—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *ss.* 11, 23, 68.] The county authority of a county, the whole of which was divided into hundreds, made an order, under s. 20 of the Highways and Locomotives (Amendment) Act, 1878, declaring every main road in each hundred to be repairable by that hundred, and one-half the expense of repairing the same to be repayable out of a separate rate levied on the hundred. Sect. 11 of the Local Government Act, 1888, casts the duty of maintaining and repairing all main roads within the county upon the county council, and provides that "the execution of this section shall be a general county purpose, and the costs thereof shall be charged to the general county account"; and, further that s. 20 of the Highways and Locomotives (Amendment) Act, 1878, "shall apply as if it were herein re-enacted and in terms made applicable to this section." By s. 23 of the

LOCAL GOVERNMENT—*continued.*

Local Government Act, 1888, all sums for the time being standing to the exchequer contribution account, which is an account of sums received by the county council in respect of certain duties on local taxation licences, and the probate duty grant made to the county by the Commissioners of Inland Revenue, shall be applied (after making certain other specified payments) "in repaying to the general county account of the county fund the costs on account of general county purposes for which the whole area of the county is liable to be assessed to county contributions." By s. 68, "general county purposes" are defined as "all purposes declared by this or any other Act to be general county purposes, and all purposes for contributions to which the county council are for the time being authorized by law to assess the whole area of their administrative county"; and "special county purposes" are defined as "any purposes from contribution to which any portion of the county is for the time being exempt," including "any purposes where the expenditure involved is by law restricted to a hundred, division, or other limited part of the county": — *Held*, that the maintenance and repair of main roads in the hundreds were "general county purposes" within the meaning of ss. 11, 23, and 68 of the Local Government Act, 1888; so that the county council were entitled to apply moneys taken from the exchequer contribution account in recouping the general county fund so much of the costs of such maintenance and repair as was not provided for by the special rates on the hundreds. THE QUEEN *v.* DOLBY [736

LOCOMOTIVE — On road — Highway — Extraordinary traffic—Extraordinary expenses *See* HIGHWAY. [515

LUNATIC—*Maintenance — Pauper—Expenses of Maintenance in Asylum—Union in which Lunatic has acquired exemption from removal—Order for Payment—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *ss.* 287, 294.] A person who had acquired exemption from removal by residence in a certain union became insane, and was sent to a pauper lunatic asylum. Some months afterwards she was released on trial, and resided for about seven weeks with her relations in another union, when she got worse, and was again received into the asylum. At the time of her release her mental capacity was such that she was incapable of exercising any independent choice as to her residence. A magistrate's order was obtained ex parte, under ss. 287 and 294 of the Lunacy Act, 1890, directing payment by the union in which the lunatic had acquired exemption from removal of the expenses of her removal to the asylum and her maintenance there after she had been received into the asylum the second time.—On a rule for a certiorari to quash the order:—*Held*, that the temporary absence of the lunatic from the union where she had acquired exemption from removal, when she was incapable of exercising any choice as to her residence, did not constitute such a break of residence as to put an end to her status of irremoveability, and the order was right:—*Held*, also, that the order was rightly made ex parte. THE QUEEN *v.* BRUCE - - - - 136

LUNATIC—*continued.*

2. —— *Asylum—Expenses of Pauper Lunatics —Parochial Rates on Asylum Buildings—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *s.* 283.] The expression, "the expenses of maintenance and other expenses of each pauper lunatic in the asylum," in s. 283 of the Lunacy Act, 1890, includes the payment of parochial and other rates charged upon the buildings of the asylum, and payment of such rates may lawfully be made out of the maintenance fund of the asylum. THE QUEEN *v.* DOLBY - - - - 301

MANDAMUS — *Practice — Second Application after Discharge of First—Fresh Materials.*] Where a rule for a mandamus to compel a corporation to perform a statutory duty has been discharged, on the ground that no demand and refusal have taken place, the Court will not grant another rule for a mandamus for the same purpose, although a demand and refusal have taken place since the discharge of the former rule.—*Ex parte Thompson* (6 Q. B. 721) followed. THE QUEEN *v.* MAYOR AND JUSTICES OF BODMIN - 21

MARRIED WOMAN — Separate estate — Discovery in aid of execution - 626
See COUNTY COURT. 3.

MASTER AND SERVANT — *Wages — Payment otherwise than in Current Coin—Deductions for Sick and Accident Club—Truck Act* (1 & 2 *Wm.* 4, *c.* 37).] The plaintiff was in the employment of the defendants, and on entering their service she signed an agreement by which she bound herself to conform to all the rules and regulations of the firm. One of the rules was that all the employés were to become members of the sick and accident club, and the rules of the club provided for a weekly subscription to the club funds proportioned to the wages of each contributor. A deduction was accordingly made each week from the plaintiff's wages, and paid over to the fund. On leaving the defendants' service the plaintiff sued to recover the amount of such deductions except so much as represented her contribution for medicine or medical attendance:—*Held* (affirming the judgment of the Queen's Bench Division), that the agreement signed by the plaintiff could not, by reason of the Truck Acts, be vouched by the defendants to justify the deductions or as an authority by the plaintiff to pay the contributions on her behalf to the fund, but that the plaintiff was precluded by her acquiescence in such payment from recovering the amount from the defendants. HEWLETT *v.* ALLEN & SONS - C. A. 662

—— Way used in business of employer—Defect in condition of way - - 92
See EMPLOYERS' LIABILITY ACT.

METROPOLIS—*Management Acts—"New Street" —Paving, Liability for Expenses of—Old Highway converted into Street by Building — Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 105—*Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 112.] By s. 105 of the Metropolis Management Act, 1855, in case the owners of the houses forming the greater part of "any new street laid out or made, or hereafter to be laid out or made," which is not paved to the satisfaction of the vestry or district board,

METROPOLIS—*continued.*
be desirous of having the same paved, or if such vestry or board deem it necessary or expedient that the same should be so paved, then such vestry or board may pave the same, and the expenses are to be charged on the owners of the houses forming such street. By s. 250 the word "street" shall apply to and include any highway.—By s. 112 of the Metropolis Management Amendment Act, 1862, which is to be construed together with the before-mentioned Act, "the expression 'new street' shall apply to and include all streets hereafter to be formed or laid out, and a part of any such street, and also all streets, the maintenance of the paving and roadway whereof had not, previously to the passing of this Act, been taken into charge and assumed by the commissioners, trustees, surveyors, or other authorities having control of the pavements or highways in the parish or place in which such streets are situate, and a part of any such street, and also all streets partly formed or laid out," and "the word 'pave' shall apply to and include the formation of the roadway or footway of any street":—*Held*, that s. 112 of the Metropolis Management Amendment Act, 1862, does not restrict the meaning of the expression "new street," and therefore that that expression, as used in s. 105 of the Metropolis Management Act, 1855, includes a new street in the ordinary and popular sense of the term. An ancient country highway which became a "new street" in that sense by the erection of buildings fronting it, shortly before, or after the passing of the Metropolis Management Act, 1855, is within the terms of s. 105 of that Act, and the expense of paving it may be charged upon the owners under that section.—*Pound* v. *Plumstead Board of Works* (Law Rep. 7 Q. B. 183) followed. VESTRY OF ST. GILES, CAMBERWELL *v.* CRYSTAL PALACE COMPANY - - - **C. A. 33**

2. —— *Management Acts—Metropolis Management and Building Acts Amendment Act*, 1882 (45 & 46 *Vict. c.* 14), *s.* 13—"*Wooden structure or erection of a moveable or temporary character*"—*Builder's Pay-office on Wheels.*] A builder's office, constructed of wood and roofed with zinc, and placed upon iron wheels for the purpose of enabling it to be wheeled about to any place where building operations were being carried on, was, when not required at any such place, kept in the builder's own yard and used as a pay-office for his men:—*Held*, that it was not a "wooden structure or erection of a moveable or temporary character" within the meaning of s. 13 of the Metropolis Management and Building Acts Amendment Act, 1882, and did not require a licence in writing from the London County Council for its erection. LONDON COUNTY COUNCIL *v.* PEARCE - **109**

3. —— *Management Acts—Nuisance—Defect of Structural Character—Notice to Abate served on Owner or Occupier—Abatement by Occupier—Liability of Owner to recoup Occupier Expenses of Abatement — Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *ss.* 4, 11.] The plaintiff was tenant from year to year to the defendants of a house in London, in which a nuisance arose by reason of water and sewage collecting in the cellar owing to a stoppage in the drains. The sanitary authority, acting under s. 4, sub-s. 1, of the Public Health (London) Act, 1891, served a notice at the premises directed to the owner or occupier, and requiring the nuisance to be abated; they did not serve on the owner a notice under s. 4, sub-s. 3, which provides for the service on the owner of a notice to abate in cases where the nuisance arises from any want or defect of a structural character. The plaintiff, who under s. 4, sub-s. 4, was liable to a penalty of 10*l.* if he made default in complying with the requisitions of the notice, did the necessary work, in the course of which it was discovered that the nuisance arose from a structural defect in the drains:—*Held*, that the plaintiff was entitled under s. 11, sub-s. 1, of the Act to recover from the defendants the costs and expenses incurred in abating the nuisance as money paid by him for the use and at the request of the defendants, although no notice under s. 4, sub-s. 3, had been served upon the defendants as owners of the premises:—*Held*, further, that the costs and expenses incurred in carrying "the order" into effect must be taken to include the costs and expenses of carrying into effect the "notice" from the sanitary authority, although no "nuisance order" under s. 5 had been obtained by the sanitary authority upon complaint to a petty sessional division.—*Per* Charles, J.: Apart from the provisions of s. 11, the plaintiff was entitled to recover at common law on the ground that he had been compelled to expend money upon work for which the defendants were legally responsible. GEBHARDT *v.* SAUNDERS - - - **452**

4. —— *Local Management — Vestryman — Qualification — Rating — Occupation—Metropolis Local Management Acts*, 1855 *and* 1856 (18 & 19 *Vict. c.* 120, *s.* 6; 19 & 20 *Vict. c.* 112, *s.* 8).] By s. 6 of the Metropolis Local Management Act, 1855 (as amended by s. 8 of the Metropolis Local Management Act, 1856), no person shall be capable of acting or being elected as a vestryman for any parish unless he occupies premises in the parish of a rateable value of not less than 40*l.*—The defendant was the tenant of premises which appeared in the rate-book as of the rateable value of 125*l.* He sublet a portion of such premises and occupied the remainder. The portion which he retained in his own occupation was found by the jury to be of a rateable value of not less than 40*l.*, but was not separately assessed in the rate-book. The defendant occupied no other premises in the parish. In an action to recover penalties from the defendant for acting as a vestryman without being duly qualified:—*Held*, reversing the judgment of Denman, J., that the defendant was qualified by rating and occupation to act as a vestryman. GORDON *v.* WILLIAMSON **C. A. 459**

5. —— *Building Acts—Compulsory Purchase of Land by School Board—Right to Build within prescribed Distance of Centre of Roadway—Inconsistent Enactments—Elementary Education Act*, 1870 (33 & 34 *Vict. c.* 75), *ss.* 19, 20—*Metropolis Management and Building Acts Amendment Act*, 1878 (41 & 42 *Vict. c.* 32), *ss.* 4, 6.] By s. 19 of the Elementary Education Act, 1870, power is given to a school board to purchase land for the purpose of providing sufficient public school accommodation for their district, and by s. 20 the Educa-

METROPOLIS—*continued.*
tion Department may make a provisional order authorizing a school board, subject to confirmation of the order by Act of Parliament, to put in force the powers contained in the Lands Clauses Consolidation Acts with reference to the purchase of land otherwise than by agreement. The school board for London, acting under the powers of the Elementary Education Act, 1870, and of a special Act confirming a provisional order, compulsorily acquired a piece of land for the purpose of providing sufficient public school accommodation, the land being defined by metes and bounds in the schedule to the special Act. The school board then built upon the land a school with a playground attached, the external fence of the playground being within twenty-feet of the centre of a public highway:—*Held*, that the provisions of ss. 4 and 6 of the Metropolis Management and Building Acts Amendment Act, 1876, which forbid the erection without the consent of the Metropolitan Board of Works of any building, wall, or fence within twenty feet of the centre of a highway, were inconsistent with the statutory powers given to the school board for the acquisition and user of the land, and that the school board could therefore use the land for the statutory purposes for which it was acquired free from the restrictions imposed by those provisions. LONDON COUNTY COUNCIL *v.* SCHOOL BOARD FOR LONDON - 606

MILK—Adulteration—"Place of delivery" 196, *See* ADULTERATION. 1, 2. [200

MORTGAGE—Attornment clause—Power of distress—Bill of sale - - - 330
See BILL OF SALE.

—— Constructive notice—Assignment of debt
See ASSIGNMENT OF DEBT. 1, 2. [1, 700

MUTUAL CREDIT—Life insurance company—Policy not matured at commencement of winding-up - - - - 573
See COMPANY. 2.

NAVY—Officer—Right to resign commission—Conditions of service - - 144
See ARMY AND NAVY. 2.

NEGLIGENCE—Employers' Liability Act—Way used in business of employer—Defect in condition of way - - - 92
See EMPLOYERS' LIABILITY ACT.

NUISANCE—Metropolis — Management Acts — Defect of structural character—Notice to abate served on owner or occupier—Abatement by occupier — Liability of owner to recoup occupier's expenses of abatement - - - - 452
See METROPOLIS. 3.

OFFICER—Navy—Right to resign commission
See ARMY AND NAVY. 2. [144

OWNER—Rates—Assessment of poor-rate 118
See POOR-RATE. 2.

PARTNERSHIP—Holding out as partner—Liability of retiring partner - - 633
See BANKRUPTCY. 6.

PENALTY—Action—Interrogatories—Copyright—Design - - - - 321
See PRACTICE. 10.

—— Railway—Passenger—Fare—Condition on ticket—Ticket used for station other than that for which it is available—Action to recover full fare to station at which passenger alighted - - - 595
See RAILWAY. 2.

PICTURE—Copyright—Action for infringement—Production of original picture, whether necessary - - - - 113
See COPYRIGHT. 2.

POOR LAW—*Settlement—Residence apart from Parent while under Sixteen—Irremoveability—Divided Parishes and Poor Law Amendment Act*, 1876 (39 & 40 *Vict. c.* 61), *s.* 34.] A pauper had resided from the age of fourteen to the age of eighteen in a parish in the appellant union. Her father was dead, and her widowed mother resided outside the appellant union:—*Held*, that the time during which the pauper was under sixteen ought to be reckoned in determining whether she had resided in the parish for the term of three years, under such circumstances in each of such years as would render her irremoveable, and, therefore, she had acquired a settlement in the parish under s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876. GUARDIANS OF WEST HAM UNION *v.* CHURCHWARDENS, &C., OF PARISH OF ST. MATTHEW, BETHNAL GREEN - - - - 65

2. —— *Settlement — Residence while under Sixteen apart from Parent — Irremoveability — Divided Parishes and Poor Law Amendment Act*, 1876 (39 & 40 *Vict. c.* 61), *s.* 34.] A pauper had resided, in domestic service, from the age of fourteen to the age of eighteen, in a parish in the appellant union. Her father was dead and her widowed mother resided outside the appellant union:—*Held* (affirming the judgment of the Queen's Bench Division), that as the pauper was living away from her family the proviso in 11 & 12 Vict. c. 111, did not apply, and that she could, though under sixteen, acquire a status of irremoveability, and that, therefore, the time during which she was under sixteen ought to be reckoned in determining whether she had acquired a settlement in the parish under s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876, by residence for a term of three years under such circumstances in each year as would render her irremoveable. GUARDIANS OF WEST HAM UNION *v.* CHURCHWARDENS, &C., OF PARISH OF ST. MATTHEW, BETHNAL GREEN - - C. A. 676

—— Lunatic — Expenses of maintenance in asylum - - - - 136
See LUNATIC.

—— Lunatic—Asylum — Expenses of pauper lunatics - - - - 301
See LUNATIC. 2.

POOR-RATE—*Sewers, Non-rateability of—Beneficial Occupation—Hypothetical Tenant—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 150.] The Metropolitan Board of Works, under powers given to them by statute, constructed certain sewers in the respondent parish for the purposes of the main drainage of the

POOR-RATE—*continued.*

metropolis. The powers, liabilities, and property of the Board were, by the Local Government Act, 1888, s. 40, sub-s. 8, transferred to the appellants. The above-mentioned sewers having been rated to the poor-rate of the parish, in a case stated by quarter sessions upon appeal against the rate, it was found that, whilst used as part of the metropolitan sewage system, the sewers were incapable of yielding a profit and could not be worked except at a loss; but it was also found that, if they were, not in the possession of the appellants, but in the hands of a private owner and connected with the metropolitan sewage system to be let to the appellants, they would be willing to pay a yearly rent for the same, for the purpose of being used as part of the metropolitan sewage system, sufficient to support the rate:—*Held*, upon the construction of the enactments relating to the Metropolitan Board of Works, that the appellants had no power legally to become tenants of such sewers; that they therefore could not be considered as possible tenants of them; that the sewers were not capable of a beneficial occupation; and that they were therefore not rateable.—*Mayor, &c., of Burton-upon-Trent* v. *Assessment Committee of Burton-upon-Trent* (24 Q. B. D. 197) distinguished.—*Reg.* v. *Metropolitan Board of Works* (Law Rep. 4 Q. B. 15) and *Metropolitan Board of Works* v. *West Ham* (Law Rep. 6 Q. B. 193) followed. LONDON COUNTY COUNCIL *v.* CHURCHWARDENS, &c., OF PARISH OF WEST HAM **C. A. 44**

2. —— *Tenements of Limited Value—Power to Rate Owner instead of Occupier—Rise of Value above Statutory Limit—Poor Rate Assessment and Collection Act*, 1869 (32 & 33 *Vict. c.* 41), *ss.* 3, 4.] The vestry of a parish are only entitled, under s. 4 of 32 & 33 Vict. c. 41, to order the owner of a hereditament to be rated to the poor-rate instead of the occupier so long as the rateable value of such hereditament does not exceed the limits specified by s. 3 of that Act. OVERSEERS OF NORWOOD *v.* SALTER - - - **118**

PRACTICE—*Arbitration—Special Case stated by Arbitrators—Appeal—Costs of Special Case—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 19.] No appeal lies from the decision of the High Court upon a special case stated by an arbitrator with regard to a question of law arising in the course of the reference under s. 19 of the Arbitration Act, 1889.—Except so far as there may be power under s. 20 of the Act to impose terms as to costs on making an order for the statement of a special case, the Court has no power to make an order as to the costs of a special case under s. 19. IN RE KNIGHT AND TABERNACLE PERMANENT BUILDING SOCIETY - - **C. A. 613**

2. —— *Costs—Jurisdiction—Proceedings on the Crown Side of the Queen's Bench Division—Order* LXV., *r.* 1—*Judicature Act*, 1890 (53 & 54 *Vict. c.* 44), *ss.* 4, 5.] The practice in proceedings on the Crown side of the Queen's Bench Division is unaltered by the Judicature Act, 1890, and there is, therefore, no power to give costs to a successful appellant in a case stated by quarter sessions. LONDON COUNTY COUNCIL *v.* CHURCHWARDENS, &c., OF WEST HAM. [2] - **C. A. 173**

PRACTICE—*continued.*

3. —— *Costs—Taxation on County Court Scale—Judgment for* 50*l.—Order* LXV., *r.* 12—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 116.] If the plaintiff in an action in the High Court which might have been brought in a County Court, recovers 50*l.* and no more, he is only entitled, in the absence of a special order or certificate by the judge, to costs on the County Court scale. MILLINGTON *v.* HARWOOD **C. A. 166**

4. —— *County Court—Action commenced in High Court—Transfer before Trial to County Court—Jurisdiction after Transfer—Costs—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *Part III., s.* 65; *Part IV., s.* 116.] After an action commenced in the High Court of Justice has been transferred to the county court, under the County Courts Act, 1888, Part III., s. 65, it becomes a county court cause, and the High Court has no jurisdiction to certify for costs.—*Per* Bowen, L.J., and Kay, L.J.: The meaning of sub-s. 2 of s. 116, in Part IV. of the same Act, is, that a certificate or an order to the effect therein mentioned may be made by a judge of the High Court in cases where he already has jurisdiction; and the rules laid down in that section are only applicable to actions which have not been transferred. HARRIS & SONS *v.* JUDGE **[C. A. 565**

5. —— *Default of Defence—Motion for Judgment—Jurisdiction of Court to order Interlocutory Judgment—Order* XXVII., *r.* 11.] Upon motion for judgment under Order XXVII., r. 11, upon default in delivery of defence, the Court or a judge may order interlocutory judgment to be entered, and may refer the whole claim to an official referee to ascertain and report to the Court the amount due to the plaintiff. CHARLES *v.* SHEPHERD - - - - **C. A. 622**

6. —— *Discovery—Documents—Infant.*] An infant party to an action cannot be compelled to make discovery of documents. CURTIS *v.* MUNDY **[178**

7. —— *Discovery—Interrogatories—Defamation—Libel—Evidence in Mitigation of Damages—Order* XXXVI., *r.* 37.] By Order XXXVI., r. 37, "In actions for libel and slander, in which the defendant does not by his defence assert the truth of the statement complained of, the defendant shall not be entitled on the trial to give evidence in chief, with a view to mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff, without the leave of the judge, unless, seven days at least before the trial, he furnishes particulars to the plaintiff of the matters as to which he intends to give evidence:—*Held*, that where the defendant has, within the time limited by the rule, furnished particulars to the plaintiff of matters as to which he intends to give evidence in mitigation of damages, he is entitled to administer interrogatories to the plaintiff as to the matters referred to. SCAIFE *v.* KEMP & CO. - - - **319**

8. —— *Discovery—Principal Resident Abroad—Action in Name of Agent—Staying Action till Discovery made.*] Where the agent of a principal resident abroad brings an action in his own name,

PRACTICE—*continued.*

and on a contract made with him as agent, the defendant is entitled to discovery to the same extent as if the principal were a party to the action, and to have the action stayed till such discovery is made. WILLIS & CO. *v.* BADDELEY [C. A. 324

9. —— *Interrogatories—Action for Penalties—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 58.] By s. 58 of the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), which prohibits infringements of copyright in registered designs, it is enacted that "Any person who acts in contravention of this section shall be liable for every offence to forfeit a sum not exceeding 50*l.* to the registered proprietor of the design, who may recover such sum as a simple contract debt by action":—*Held*, that the sum so forfeited must be taken to be a penalty, and that the plaintiff in an action to recover such sum is consequently not entitled to interrogate the defendant.—*Adams* v. *Batley* (10 Q. B. D. 625) distinguished. SAUNDERS *v.* WIEL - - - - 18

10. —— *Interrogatories—Action for Penalties—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 58.] By s. 58 of the Patents, Designs, and Trade Marks Act, 1883, which prohibits infringements of copyright in registered designs, it is enacted that "Any person who acts in contravention of this section shall be liable for every offence to forfeit a sum not exceeding 50*l.* to the registered proprietor of the design, who may recover such sum as a simple contract debt by action":—*Held* (affirming the judgment of the Queen's Bench Division), that a sum so forfeited must be taken to be a penalty, and that the plaintiff in an action to recover such a sum is not entitled to interrogate the defendant as to the infringements charged.—*Adams* v. *Batley* (18 Q. B. D. 625) distinguished. SAUNDERS *v.* WIEL - - - - C. A. 321

11. —— *Stamp—Ruling of Judge—Application for Nonsuit, or to enter Judgment, or for a New Trial—Order* XXXIX., *r.* 8.] Where a judge, trying an action without a jury, rules that the stamp upon any document is sufficient, or that the document does not require a stamp, the decision is final, and no appeal lies to the Court of Appeal by way of application for a nonsuit, or to enter judgment, or for a new trial. BLEWITT *v.* TRITTON - - - - C. A. 327

12 —— *Writ specially Indorsed—Common Money Bond—Penalty*—8 & 9 *Wm.* 3, *c.* 11, *s.* 8—4 & 5 *Anne, c.* 16, *ss.* 12, 13—*Order* III., *r.* 6; *Order* XIII., *r.* 14; *Order* XIV., *rr.* 1, 4, 6.] It is competent to the plaintiff in an action upon a common money bond within the meaning of 4 & 5 Anne, c. 16, s. 12, to proceed under Order XIV. for the purpose of obtaining final judgment.—*Tuther* v. *Caralampi* (21 Q. B. D. 414) distinguished. GERRARD *v.* CLOWES - - - - 11

13. —— *Writ specially Indorsed—Sufficiency of Indorsement—Claim for Interest—Order* III., *r.* 6; *Order* XIV., *r.* 1.] An indorsement of a claim for interest on a writ of summons, in order to be a good special indorsement, within the meaning of Order III., r. 6, and Order XIV., r. 1, must shew, either that the interest claimed is payable under an agreement, or that it is fixed by statute.—An indorsement on a writ stated that the claim was for instalments on shares in the plaintiff company, payable under terms of allotment, and for interest thereon at the rate of 10 per cent. per annum, from the respective dates when the instalments became payable until payment or judgment, and gave particulars of the instalments, with interest calculated accordingly, and claimed interest on the principal moneys at 10 per cent. from date of writ until payment or judgment. It appeared from an affidavit that by the articles of association 10 per cent. interest was payable:—*Held*, that, as the writ did not shew that the interest was payable under an agreement, there was not a good special indorsement; and the fact that the affidavit shewed an agreement to pay interest could not make it good, and judgment could not be entered under Order XIV. GOLD ORES REDUCTION COMPANY *v.* PARR - - - - - - 14

—— Appeal—County court—Rivers Pollution Act - - - - - 274
See LOCAL GOVERNMENT. 2.

—— Copyright—Design—Defendants' particulars of objection—Amendment - 317
See COPYRIGHT.

—— Mandamus—Second application after discharge of first—Fresh materials - 21
See MANDAMUS.

—— Solicitor—Unqualified person—Money and documents in possession of unqualified person acting as solicitor—Attachment
See SOLICITOR. [261

—— Solicitor—Breach of duty—Failure to pay over money to client—Judgment recovered by client—Disciplinary jurisdiction of Court - - - 440
See SOLICITOR. 2.

PRINCIPAL AND AGENT—Knowledge of agent imputed to principal—Insurance—Accident - - - - - 534
See INSURANCE.

PRINCIPAL AND SURETY—*Laches of Employer—Contract that Works shall be well and truly executed—Failure to superintend Work—Dishonest Concealment of Defective Work—Certificate of Engineer—Payment of Retention Money—Alteration of Surety's Position.*] A surety for a contractor is not discharged from liability, although his position has been altered by the conduct of the employer, where that conduct has been caused by a fraudulent act or omission of the contractor against which the surety has, by the contract of suretyship, guaranteed the employer. — The defendants, as sureties, contracted with the plaintiffs that the contractors for certain works would "well and truly" execute their contract. The contract gave to the plaintiffs a right of superintending the works through their engineer. It also provided for the retention of a certain percentage of the contract price of the works until a final certificate should be given by such engineer, six months after his certificate of the completion of the work. The contractors did portions of the

PRINCIPAL AND SURETY—*continued.*
work in a defective manner, and fraudulently concealed the defective work so as to prevent its being discovered. The engineer ultimately gave his final certificate, upon which the retention money was paid to the contractors. In an action brought by the plaintiffs against the defendants as sureties, the jury found that the engineer's certificate for the work done had been obtained by fraud, but also that there was an omission on the part of the plaintiffs to properly superintend the work which led to the scamping of it:—*Held*, that the mere non-exercise by the plaintiffs of their right of superintendence did not discharge the defendants from their liability as sureties; and also, that they were not discharged by the fact that the plaintiffs' engineer had given his final certificate, although the work was not properly done, or that the retention money had been thereupon paid, inasmuch as the mere giving of the certificate was not shewn to have altered the position of the defendants for the worse, and both that and the payment of the retention money were procured by a dishonest execution of the work against which the defendants had by their contract guaranteed the plaintiffs. MAYOR, &c., OF KINGSTON-UPON-HULL *v.* HARDING **C. A. 494**

PRIORITY — Assignment of debt—Company—Holder of debenture - - **1, 700**
See ASSIGNMENT OF DEBT. 1, 2.

PROBATE AND ADMINISTRATION—*Administration Bond—Payment of Legacies out of Estate—Legacy to Minor—Failure to make Provision for Payment—Breach of Condition to well and truly administer—Liability of Sureties—Court of Probate Act*, 1857 (20 *&* 21 *Vict. c.* 77), *s.* 81.] By the terms of an administration bond, the administratrix, to whom a grant of probate with the will annexed had been made, was, among other things, to well and truly administer the personal estate and effects of the deceased, "that is to say, pay the debts of the deceased which he did owe at his decease, and then the legacies contained in the said will . . . ." She got in the estate and paid the debts and the legacies, with the exception of one of 50*l.* bequeathed to a minor. To meet this legacy she handed over 50*l.* to her brother-in-law, who did not pay over the money and could not be found. The residue of the estate was distributed, and none remained in the hands of the administratrix to meet the legacy. In an action against the sureties of the bond, which had been assigned by order of the Court of Probate to a guardian on behalf of the legatee who was still a minor:—*Held*, that the payment of the 50*l.* out of the estate having become impossible, there was a breach of the condition of the bond to well and truly administer, which rendered the sureties liable. DOBBS *v.* BRAIN - - **C. A. 207**

PROBATE DUTY—Revenue—Bonâ fide mistake in valuation—Liability of executor—"Person acting in the administration of the estate" - - - - **289**
See REVENUE. 2.

PROVISIONAL LIQUIDATOR—Winding-up order—Appointment of provisional liquidator after winding-up order—Official receiver
See COMPANY. [220

QUARTER SESSIONS—Appeal against summary conviction—Grounds of appeal—Excessive punishment—Jurisdiction to quash conviction - - - - **719**
See JUSTICES. 3.

QUO WARRANTO—*Acceptance of Incompatible Office—Non-corporate Office—Necessity for User.*] In order to make the remedy by quo warranto applicable in the case of a non-corporate office, there must be something more than mere acceptance of the office.—Defendant, while holding the office of churchwarden, was proposed for the office of vestry clerk and declared elected. He published a letter thanking the electors, but never acted as vestry clerk.—On an application for a quo warranto, on the ground that the office of vestry clerk was incompatible with that of churchwarden:—*Held*, that what defendant had done was not such an exercise of the office of vestry clerk as to render the remedy by quo warranto applicable. THE QUEEN *v.* TIDY **179**

RAILWAY—*Traffic Management—Undue Preference—Lower Tolls or Rates—Rival Traders—Access to Competing Lines—Railways Clauses Consolidation Act*, 1845 (8 *&* 9 *Vict. c.* 20)—*Railway and Canal Traffic Act*, 1854 (17 *&* 18 *Vict. c.* 31), *s.* 2—*Railway and Canal Traffic Act*, 1888 (51 *&* 52 *Vict. c.* 25), *ss.* 17, 27, 29–55.] The fact that a trader has access to a competing route for the carriage of his goods may be taken into consideration by the Railway Commissioners or the Court in deciding whether lower tolls or rates charged to such trader by a railway company constitute an undue preference within the meaning of the Railway and Canal Traffic Acts, 1854 and 1888.—*Budd* v. *London and North Western Ry. Co.* (4 Ry. & Can. Cas. 393; 36 L. T. (N.S.) 802; 25 W. R. 752) must be considered as no longer law.—*Harris* v. *Cockermouth and Workington Ry. Co.* (3 C. B. (N.S.) 693); *Denaby Main Colliery Co.* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (14 Q. B. D. 209; 11 App. Cas. 97); and *London and North Western Ry. Co.* v. *Evershed* (3 App. Cas. 1029) discussed and explained. PICKERING PHIPPS *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY - - - **C. A. 229**

2. —— *Passenger—Fare—Condition on Ticket—Ticket used for Station other than that for which it is available—Action to recover full Fare to Station at which Passenger alighted—Penalty.*] The defendant, a passenger on the plaintiffs' railway, took a ticket to S., for which he paid 8*s.*; the ticket contained a condition that if used for any other station it would be forfeited and the full fare charged. He alighted at F., a station short of S., to which the fare was 9*s.*; he then took a ticket from F. to his destination on a branch line; he did not give up at F. the ticket he had originally taken. The plaintiffs brought an action in the county court, claiming to be entitled to recover 9*s.*, the full fare to F., or 1*s.* if the defendant was entitled to be credited with the 8*s.* paid by him for his original ticket; but they were nonsuited on the ground that they were suing for a penalty, which was only recoverable before justices:—*Held*, that the plaintiffs were not suing to recover a penalty but to recover a fare under the terms of the contract entered into with

RAILWAY—*continued.*
the defendant; that the action was therefore maintainable and the nonsuit was wrong.—*London, Brighton, and South Coast Ry. Co.* v. *Watson* (4 C. P. D. 118) distinguished. GREAT NORTHERN RAILWAY COMPANY *v.* WINDER - - 595
—— Superfluous lands—Sale covenant to resell portion - - - - 88
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RELEASE—*Joint Tortfeasors—Discharge of One—Reservation of Claim against the Other—Covenant not to Sue.*] A covenant not to sue one of two joint tortfeasors does not operate as a release of the other from liability. DUCK *v.* MAYEU [C. A. 511

REVENUE—*Corporation Duty — Exemptions — Common — Allotment — Application "in manner prescribed by Act of Parliament"—"Charitable Purpose"—Customs and Inland Revenue Act*, 1885 (48 & 49 *Vict. c.* 51), *s.* 11, *sub-ss.* 2, 3.] The Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51), s. 11, after reciting that certain property, by reason of the same belonging to or being vested in bodies corporate or unincorporate, escapes liability to probate, legacy, or succession duties, and that it is expedient to impose a duty thereon by way of compensation to the revenue, imposes a duty upon the annual value of real and personal property vested in any body corporate or unincorporate, subject to the exemption of (2.) "property which, or the income or profits whereof, shall be legally appropriated and applied for the benefit of the public at large, or of any . . . borough or place, or the ratepayers or inhabitants thereof, or in any manner expressly prescribed by Act of Parliament"; (3.) "property which, or the income or profits whereof, shall be legally appropriated and applied . . . for any charitable purpose."—By a private inclosure Act in 1763, certain spaces of C. Common were allotted to the corporation of York, in trust for the freemen inhabitants of B. ward in that city, as compensation for previous rights of common.—In 1632, by agreement with the lord of the manor, the fourth part of the adjoining common of H., afterwards called the "Intack," was conveyed in fee to the Mayor of York, in satisfaction of the common rights of the freemen inhabitants of B. ward. The allotments of C. Common and the Intack had ever since been enjoyed by the freemen inhabitants of B. ward, and were under the control of pasture-masters, who, after paying the expenses of management, applied the profits of the whole to the benefit of poor freemen, and also for some years past for the benefit of their widows:—*Held* (affirming the decision of Denman and Wills, JJ.), that the profits of the allotments which were applied under the Act of 1763 were exempt from corporation duty under sub-s. 2 of s. 11 of the Inland Revenue Act, 1885; but that the profits of the

REVENUE—*continued.*
Intack, not being appropriated and applied under any Act of Parliament, were not exempt under that sub-section.—*Held*, also, that the profits of the Intack were not within the exemption in sub-s. 3 as profits appropriated and applied "for any charitable purpose."—*Reg.* v. *Commissioners of Income Tax* (22 Q. B. D. 296; [1891] A. C. 531) followed.—The words "in manner expressly prescribed by Act of Parliament" in sub-s. 2 of s. 11 must be taken to refer to the object to which the profits are to be applied, not to the special methods by which such application is to be carried out. COMMISSIONERS OF INLAND REVENUE *v.* SCOTT. IN RE BOOTHAM WARD STRAYS, YORK [C. A. 152

2. —— *Probate Duty—Bonâ fide Mistake in Valuation—Liability of Executor after close of Administration—"Person acting in the Administration of the Estate" — Customs and Inland Revenue Act*, 1881 (44 & 45 *Vict. c.* 12), *s.* 32.] By. s 32 of the Customs and Inland Revenue Act, 1881, it is provided, that "if at any time it shall be discovered that the personal estate and effects" of a deceased person "were at the time of the grant of probate . . . . of greater value than the value mentioned in the certificate . . . . the person acting in the administration of such estate and effects shall within six months after the discovery deliver a further affidavit with an account to the Commissioners of Inland Revenue, duly stamped with the amount which, with the duty (if any) previously paid on an affidavit in respect of such estate and effects, shall be sufficient to cover the duty chargeable according to the true value thereof."—A testator bequeathed certain pictures and other property to be held by trustees as heirlooms. His executors, upon his death, caused a valuation to be made for probate purposes, and delivered to the Commissioners of Inland Revenue an affidavit of value with an account on the basis of such valuation, duly stamped in accordance with the provisions of the Customs and Inland Revenue Act, 1881. Upon this a certificate was issued stating the value as shewn by the account, and probate was granted. Some time after the executors had fully and finally wound up the estate, it was discovered that one picture had been omitted from the valuation, and that others had been considerably undervalued. No suggestion was made of any negligence on the part of the executors, or of any incompetency on the part of the valuer.—On an information praying that the executors should be ordered to deliver a further affidavit and account, in accordance with the provisions of s. 32:—*Held*, that the executors, having completed the duties of administration, were not "persons acting in the administration of the estate" within the meaning of the section, and were not therefore liable. ATTORNEY-GENERAL *v.* SMITH - 289

3. —— *Estate Duty—Succession Duty—"Succession" of a value exceeding* 10,000*l.*—36 *Geo.* 3, *c.* 52, *s.* 12—*Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), *ss.* 1, 2, 10, 32—*Customs and Inland Revenue Act*, 1889 (52 & 53 *Vict. c.* 7), *s.* 5, *sub-ss.* 1, 4, 5; *s.* 6, *sub-ss.* 1, 2, 4.] By the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 6, sub-s. 1, an estate duty of one per cent. is

REVENUE—*continued.*
charged upon any succession upon the death of any person where the value of such succession exceeds 10,000*l.* By sub-s. 4: "The duty imposed by this section is to be in addition to any duties chargeable under the Succession Duty Act, 1853, and s. 21 of the Customs and Inland Revenue Act, 1888, and shall, subject to the provisions of this Act, be assessed and paid in like manner as succession duty, and be subject to the enactments relating to that duty, so far as the same are applicable." By the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 1: "In the construction and for the purposes of this Act, the term 'succession' shall denote any property chargeable with duty under this Act." By s. 10: "There shall be paid in respect of every such succession as aforesaid—where the successor shall be the lineal issue of the predecessor, a duty at the rate of one per cent. (now one and a half per cent.) upon the value thereof." By s. 32: "The following provisions relating to the assessment and payment of duty on personal estate and the exemption thereof from duty in certain cases, viz., among others, s. 12 of 36 Geo. 3, c. 52, shall be applicable to the personal property comprised in any succession, and to the assessment and payment of duty thereon, as if such personal property was a legacy bequeathed by the predecessor to the successor, and were subject to the said provisions." By 36 Geo. 3, c. 52, s. 12: "The duty payable on a legacy or residue, or part of residue, of any personal estate, given to or for the benefit of, or so that the same shall be enjoyed by, different persons in succession, who shall be chargeable with the duties hereby imposed at one and the same rate, shall be charged upon and paid out of the residue or legacy, or part of residue, so given, as in the case of a legacy to one person."—Under a marriage settlement, upon the death of the settlor, who was the father of the wife, a fund of more than 10,000*l.* became vested in the trustees in trust for the wife for life with remainder to the younger children of the marriage in equal shares absolutely:—*Held*, that the effect of sub-s. 4 of s. 6 of the Customs and Inland Revenue Act, 1889, was to incorporate into sub-s. 1 the definition of the term "succession" which is contained in s. 1 of the Succession Duty Act, 1853, viz., "any property chargeable with duty under this Act," and that, therefore, as the persons here entitled in succession, being the lineal issue of the predecessor, were chargeable with succession duty at the same rate under s. 10 of the Succession Duty Act, 1853, and succession duty was in such case made a charge upon the fund by s. 32 of the Succession Duty Act, 1853, and s. 12 of 36 Geo. 3, c. 52, the fund constituted a "succession" of a value exceeding 10,000*l.*, upon which estate duty was payable. ATTORNEY-GENERAL *v.* LORD ABERDARE - - - - - - 684

4. —— *Succession Duty—Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 20, 38.] Under a marriage settlement a fund was vested in trustees in trust for the wife for life, with remainder to the husband for life, with remainder in default of issue to the wife absolutely. There was no issue of the marriage, the husband predeceased the wife, and upon his death the trustees transferred the

REVENUE—*continued.*
fund to her:—*Held*, that upon the death of the husband a succession was taken by the wife, in respect of which succession duty was payable on the amount of the fund, less the value of her life interest therein. ATTORNEY-GENERAL *v.* ROBERTSON - - - - - - - 694

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SHERIFF—*Execution—Concurrent Writs of fi. fa.—Penalty under Sheriffs Act*, 1887 (50 & 51 *Vict. c.* 55), *s.* 29—*Overcharge by Mistake—Demand—Condition Precedent—Order as to Fees under Sheriffs Act*, 1887.] The Sheriffs Act, 1887, by s. 29, imposes a penalty of 200*l.* upon any sheriff's officer who (inter alia) "takes or demands any money or reward under any pretext whatever,

SHERIFF—*continued.*

other than the fees or sums allowed by or in pursuance of this or any other Act," or "is guilty of any offence against or breach of the provisions of this Act":—*Held*, that the penalty is inflicted for the doing of an act in the nature of a criminal offence; that to constitute such an offence there must be a mens rea; and that, consequently, a sheriff's officer is not liable to the penalty if he makes an overcharge by mistake.—In order to constitute an offence under the Act, it is not necessary that the improper demand or taking of money should be made a condition precedent to the officer's doing his duty.—Opinion of Cave, J., in *Trustee of Woolford's Estate* v. *Levy* ([1892] 1 Q. B. at p. 776), dissented from.—An execution debtor brought an action against the execution creditors, their solicitors, and the sheriff's officers for the county of London, for alleged illegal conduct in levying execution. The solicitors had issued two writs of fi. fa. for the amount of the judgment debt and costs, one directed to the sheriff for the City of London, the other to the sheriff for the county of London, and had given each set of sheriff's officers notice of the other writ, and requested them to be careful to prevent a double execution. Possession was taken under both writs. The execution in the City of London having been paid off, the sheriff's officers for the county of London demanded from the plaintiff payment of a sum which consisted in part of fees payable by the execution creditors, and did not withdraw till payment of this amount had been paid under protest. They also claimed, but did not insist on, the payment of poundage. There was no evidence of malice on the part of either the execution creditors or their solicitors, or of want of reasonable cause for the course adopted:—*Held* (affirming the decision of Denman, J.), ([1892] 1 Q. B. 231), that neither the issue of, nor the seizure under, the two writs of fi. fa. was illegal: that the sheriff's officers for the county of London were not entitled to poundage; that they were liable to the plaintiff in nominal damages for not having sooner withdrawn; but that they were not liable to the penalty of 200*l.* under s. 29 of the Act. LEE *v.* DANGAR, GRANT & CO. - - C. A. 337

2. —— *Wrongful Act of Bailiff—Liability of Sheriff to Penalty—Sheriffs Act*, 1887 (50 & 51 *Vict. c.* 55), *s.* 29, *sub-s.* 2.] By s. 29, sub-s. 2, of the Sheriffs Act, 1887: "If any person being either a sheriff, under-sheriff, bailiff, or officer of a sheriff . . . . is guilty of any offence against or breach of any of the provisions of this Act, or of any wrongful act or neglect or default in the execution of his office, or of any contempt of any superior Court, he shall . . . . be liable—(i.) to be punished by the Court as hereinafter mentioned, and (ii.) to forfeit two hundred pounds, and to pay all damages suffered by any person aggrieved."—An execution debtor brought an action against a sheriff under the above section to recover a penalty of 200*l.* on the ground that the sheriff's bailiff in executing a writ of fi. fa. had not excepted from seizure wearing apparel, bedding, tools, and implements of trade to the value of 5*l.*, as required by 8 & 9 Vict. c. 127, s. 8:—*Held*, that the liability to a penalty was

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imposed by the section only upon the person actually guilty of the wrongful act, and that the sheriff was, therefore, not liable. BAGGE *v.* WHITEHEAD - - - - C. A. 355

SHIP—*Charterparty—Warranty of Seaworthiness—Voyage in Stages.*] By a charterparty a ship was to proceed to Oran, and there load a part cargo of esparto, for delivery at Garston, with liberty to fill up with ore, or other dead weight cargo, for owner's benefit, and to call at any ports in any order. She loaded at Oran, and left with a supply of coal insufficient for a voyage thence to Garston. She called at Huelva, and was filled up with ore, but no further supply of coal was taken on board. After leaving Huelva, the ship went ashore, by reason of the insufficient supply of coal, and the cargo was lost. In an action for non-delivery of the esparto:—*Held*, by Day, J., that the voyage was an entire voyage from Oran to Garston, and that, the warranty of seaworthiness at the commencement of that voyage having been broken, the plaintiffs were entitled to recover:—*Held*, by the Court of Appeal, that even if the voyage could be treated as one divided into stages, the warranty of seaworthiness, which attaches at the commencement of each stage, had been broken at Huelva, and the plaintiffs were entitled to recover. THIN *v.* RICHARDS & CO. [C. A. 141

2. —— *Demurrage—Charterparty—Termination of Voyage—Delivery at usual Fruit Berth—Obligation to Unload.*] By a charterparty the vessel was to proceed to Hamburg with a cargo of oranges "to be discharged at usual fruit berth as fast as steamer can deliver, as customary, and where ordered by the charterers." The ship was at Hamburg ready to deliver on March 6, 1889, but the usual fruit berths were then fully occupied, and the fruit warehouses were full, and owing to the action of the harbour authorities the ship could not commence discharging until March 11, when she was discharged as fast as she could deliver:—*Held*, by the Court of Appeal (Lord Herschell, and Lindley, and Kay, L.JJ.), reversing the judgment of Charles, J.: first, that the obligation of the charterers to unload did not commence until the ship was berthed in a usual fruit berth; secondly, that the ship could not be said to be so berthed until she occupied a berth with the assent of the harbour authorities; thirdly, that in the provision in the charterparty "as fast as steamer can deliver, as customary," the word "customary" must be taken to refer to the discharge and delivery by the ship, rather than to the taking delivery by the charterer or consignee, and to mean that the discharge and delivery must be as fast as the custom of the port would allow; and lastly, that there was no delay for which the charterers were responsible, and consequently that the shipowners were not entitled to any demurrage. GOOD & CO. *v.* ISAACS [C. A. 555

3. —— *Charterparty—Excepted Perils—Disablement of Ship—Duty of Shipowner to repair Ship and complete Voyage—Constructive Loss.*] When a shipowner has agreed by charterparty that his ship shall proceed to a port of discharge and there deliver the cargo, unless prevented by

SHIP—*continued.*
the excepted perils, and the ship has to put into a port of refuge for repairs, the shipowner is liable in damages for abandoning the voyage at that port without the consent of the charterers, unless the effect of the excepted perils proves to have been such as to make it either physically impossible to complete the voyage, or so clearly unreasonable as to be impossible in a business point of view. The doctrine of constructive loss applies only as between an underwriter and his assured. ASSICURAZIONI GENERALI *v.* SS. BESSIE MORRIS COMPANY - - - **C. A. 652**

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SOLICITOR — *Unqualified Person — Money and Documents in Possession of Unqualified Person acting as Solicitor—Attachment.*] Where an unqualified person had obtained possession of money and documents by pretending to be a solicitor:—*Held*, that the Court in the exercise of its summary jurisdiction could order him to deliver up such money and documents, and upon his disobedience could punish him by attachment.—*Wilton* v. *Chambers* (7 A. & E. 524) followed. IN RE HULM & LEWIS - - - - **261**

2. —— *Breach of Duty—Failure to pay over Money to Client—Judgment recovered by Client—Disciplinary Jurisdiction of Court—Summary Order for Payment.*] Where a solicitor has committed a breach of professional duty in failing to pay over money received by him for his client, the fact that the client has brought an action against him and recovered judgment for the money does not take away the disciplinary jurisdiction of the Court summarily to order payment of the money to the client.—*In re Corbet Davies* (15 W. R. 46; 15 Law Times, 161) not followed. IN RE H. A. GREY - - - - - **C. A. 440**

SOLICITOR AND CLIENT — *Past Costs — Oral Agreement to Pay Lump Sum—Retainer out of Money of Client in Solicitor's Hands—Payment—Application for Delivery of Bill.*] A client employed a solicitor to transact for him certain business, partly contentious and partly non-contentious, and deposited with him a sum of money to be applied in payment of the costs to be incurred in such business. After the costs had been incurred, and before delivery of any bill, the solicitor and the client settled by oral agreement the amount of the costs at a lump sum, which sum the solicitor retained out of the money deposited with him. The client having subsequently become bankrupt, his trustee applied for the delivery of a bill of his costs by the solicitor:—*Held*, that the retainer of the money by the solicitor did not amount to payment, and that a bill must be delivered. IN RE WEST, KING, & ADAMS. EX PARTE CLOUGH - - - **102**

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TROVER AND DETINUE — *Joint Owners of Chattel—Right to Possession in one Co-owner—Conversion by the other Co-owner.*] The plaintiff, who was owner of a personal chattel, parted with a half-share in it to another person on an agreement that the plaintiff was to have possession of the chattel until it should be sold. The plaintiff entrusted the chattel to his co-owner for the purpose of its being taken to an auctioneer for sale. The co-owner lodged the chattel with the defendant as security for a debt due from him to the defendant. In an action by the plaintiff to recover the chattel from the defendant:—*Held*, that, under the agreement, the plaintiff had a special property in the entire chattel which entitled him to the possession of it and to recover it from the defendant. NYBERT *v.* HANDELAAR [C. A. 202

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